Supreme Court, U.S.
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No. 94-133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

EDGAR J. DIETRICH and THERESITA DIETRICH,
Petitioners,

v.

SUN EXPLORATION AND PRODUCTION COMPANY a Delaware corporation, and SUN OPERATING LIMITED PARTNERSHIP, a Delaware Limited Partnership,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION

RODGER T. EDERER
(Counsel of Record for Respondents)
GARY L. FIELD

LOOMIS, EWERT, EDERER, PARSLEY, DAVIS & GOTTING, P.C.
232 South Capitol Avenue,
Suite 1000
Lansing, MI 48933
(517) 482-2400

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QUESTIONS PRESENTED FOR REVIEW

Respondents object to the form and substance of the questions presented in Petitioners' Petition for Writ of Certiorari to the United States Supreme Court (Petition), and believe the questions should be as follows:

1. Was the dismissal of Counts I, III and IV of Petitioners' Amended Complaint—on Respondents' Motion for Summary Judgment Under FRCP 56—in conformity with substantive Michigan law, Michigan being the forum state in this diversity action?

2. Did the District Court abuse its discretion by imposing FRCP 11 sanctions on Petitioners, and their attorney, for pursuing a factually unsubstantiated claim (i.e., Court V of Petitioners' Amended Complaint)?

3. Does due process require the use of a three judge panel to adjudicate "serious" FRCP 11 sanctions?

LIST OF ALL PARTIES

The parties appear in the caption to the case. Sun Energy Partners, a Delaware Limited Partnership, whose units are publicly traded, owns not over 2% of Sun Operating Limited Partnership.

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I. STATEMENT OF THE CASE

A. DISMISSAL OF COUNTS I, III AND IV OF PETITIONERS' AMENDED COMPLAINT

We, address, first, the dismissal—on Respondents' Motion for Summary Judgment—of Counts I, III and IV of Petitioners' Amended Complaint (R.81). Petitioners' Statement of the Case fails to indicate that their claims below were closely related to and dependent upon determinations reached in state court litigation to which Petitioners were not parties. The related litigation was between landowners in the Columbus "3" Oil and Gas Field in St. Clair County, Michigan, the Wronskis and the Koziaras, and Respondents' predecessor in interest, Sun Oil Company ("Sun").

Count I, alleging illegal drainage, is related to *Wronski* v *Sun Oil Company*, 89 Mich App 11; 279 NW2d 564 (1979), *lv den* 407 Mich 863 (1979) ("*Wronski I*"). *Wronski I* involved findings of the state court, vigorously contested by Sun, that Sun had illegally overproduced certain wells in the Columbus "3" Oil and Gas Field resulting in illegal drainage of oil from Tracts 1, 2 and 6 in the field. Petitioners held an overriding royalty interest in Tracts 1, 2 and 6 and it is this interest which gave rise to this litigation.

Counts III and IV grew out of 1974 state administrative proceedings which unitized the Columbus "3" Oil and Gas Field on petition of Sun, pursuant to the Michigan Unitization Law, 1959 PA 197; MCLA 319.351, et seq; MSA 13.139(101), et seq. Dissatisfied with the unit participation percentages assigned to their field tracts, the Wronskis and the Koziaras appealed the Michigan Supervisor of Wells orders un-

itizing the field. This appeal produced *Wronski* v *Sun Oil Company*, 108 Mich App 178; 310 NW2d 321 (1981) (*"Wronski II"*). *Wronski II* resulted in a remand hearing before Michigan Department of Natural Resources, Administrative Law Judge William C. Fulkerson. Administrative Law Judge Fulkerson's Proposal for Decision (A.9)[1] (entirely adverse to Petitioners' claims in Counts III and IV) was sustained by the Michigan Supervisor of Wells and by Ingham County, Michigan, Circuit Judge Carolyn Stell (R.202, Exhibit R-1 thereto). Judge Stell's ruling is now on appeal to the Michigan Court of Appeals, Docket No. 142357. [The case is not before the Michigan Supreme Court as stated on pages 14 and 15 of the Petition.]

The summaries of Counts III and IV appearing in Petitioners' Statement of the Case (Petition, p 2) do not adequately define Petitioners' claims. On page 12 of the Petition, Petitioners rely on the affidavit of Dr. M. Y. Joshi. This affidavit (A.10) shows that the gravamen of Petitioners' case is that an inadequate participation percentage was assigned in the unitization process. For example, the penultimate paragraph 16 of the Joshi affidavit reads:

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[1] Petitioners' Appendix uses the designation "R" to refer to its appendix documents 1 through 8 instead of the standard "A" designation. Respondents in the instant brief, when referring to Petitioners' appendix documents, use the designation R.1 through R.8. Respondents follow the usual practice of using the "R" designation to cite the Record below. No confusion should arise from such dual use of the "R" designation because neither Petitioners in their Petition or Respondents in the instant opposing brief, refer to or cite R.1 through R.8 of the Record. Respondents' Appendix designates its included documents as A.9 through A.14.

> That Plaintiffs' participation percentage, had Defendants properly represented them, would be far in excess of the approximately 17% they are credited with at present.

Thus, Petitioners' Counts III and IV were an attempt to gain an increased share of the royalties generated by the Columbus "3" Field via an award of monetary damages.

B. DISMISSAL OF COUNT V AND IMPOSITION OF FRCP 11 SANCTIONS

We now address the imposition by the District Court of FRCP 11 sanctions on Petitioners (R.3, Opinion and Order Granting Sanction and R.2, Order Directing Plaintiffs to Pay Sanctions to Defendants). Here, Petitioners' Statement of the Case is both misleading and incomplete.

In Count V of their Amended Complaint, Petitioners sought monetary damages claiming that Respondents' predecessor in interest between November, 1984 and March, 1985 surreptitiously produced 881,071 barrels of oil from the Columbus "3" Field on which it did not pay royalties. Petitioners repeatedly identified November, 1984 through March, 1985 as the pertinent period of the alleged surreptitious production. In a document entitled "Plaintiffs' Claims", dated October 30, 1990, Petitioners averred:

> "Plaintiffs claim that Defendants' records show that 881,071 barrels of oil were *produced in the Columbus III field between November, 1984 and March, 1985* which Defendants did not account for and for which Plaintiffs seek compensation." (Emphasis added, R. 190 Claim, p 2)

In a brief filed by Petitioners, dated May 29, 1991, Petitioners stated:

> "The production records attached to Plaintiffs' Answer to Defendants' Motion for Summary Judgment clearly show that 881,071 barrels of oil *were produced during the relevant period* as alleged in the Complaint." (Emphasis added; R. 198; Plaintiffs' Answer and Brief, p 23)

Finally, Petitioners' attorney, on June 1, 1992, signed the Final Pretrial Order which twice so identified the production period:

> 5. **Issues of fact to be litigated.**
>
> * * *
>
> B. Did Defendants remove oil from the Columbus III field between November, 1984 and March, 1985, which was not properly accounted for?
>
> * * *
>
> 11. **Damages**. Plaintiffs claim that between November, 1984 and March, 1985, Defendants produced 881,071 barrels of oil from the Columbus Field, in which Plaintiffs claim an interest. (R.6, pp 6 and 7)

After numerous postponements, a jury trial on Petitioners' Count V (the only Count which had survived motions for summary judgment) was set to commence on July 2, 1992. On July 1, 1992, Petitioners filed two motions labeled as motions "in limine."[2] The

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[2] Petitioners attempt to justify the tardiness of their actions by stating in the petition:

first motion was entitled "Motion in Limine to Clarify and/or Amend Final Pretrial Order". This motion concluded with the following prayer:

> WHEREFORE, the Plaintiffs request that this court enter an order amending the Final Pretrial Order to properly reflect the Plaintiff's claims or enter such other order as may be appropriate to allow the Plaintiffs to claim that the 881,071 barrels of oil may have been actually produced during time periods *outside* the November, 1984 through March, 1985 time period. (Emphasis added; A.11, p 38a).

On July 2, 1992, the District Court denied both motions. Thereafter, Petitioners' then attorney, Jack C. Chilingirian, conceded to the District Court that Petitioners had no proofs to substantiate their claim:

> THE COURT: Okay. Well, it's clear then, however, that you're unable to present any proofs that the—that the oil was removed surreptitiously, or otherwise, by the

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> The Final Pretrial Order did not set the date of trial, but the Court had assured both sides that several weeks' notice would be given to the parties and counsel. (Petition, p 3).

However, Paragraph IX of the April 14, 1992 Final Pretrial Order reads:

> IX. Trial will be held in trial term beginning 7/1/92. The Court utilizes a trailing trial docket. (A-7, p 2)

Furthermore, Respondents do not agree that the District Court promised the parties "several weeks" of notice of the exact trial date.

> Defendant, with no compensation paid to the Plaintiffs during the period November 1984 through March of 1985, is that correct?
>
> MR. CHILINGIRIAN: That's correct, your Honor.

Thereafter Petitioners' oral motion for adjournment was denied and Count V was dismissed (R.4).

On Respondents' motion, and following Petitioners' answer, Petitioners were sanctioned for pursuing a factually unsubstantiated claim (R.3, pp 1, 2 and 11; A.13 and A.14). The sanctions imposed, $19,735, represented Respondents' costs incurred in defending Count V from February, 1992 (when all Counts except Count V were dismissed) until July 2, 1992 (the day of trial) (R.1, p 29). Such $19,735 was assessed in equal shares on Petitioners and on Petitioners' then attorney, Jack C. Chilingirian (R.2, p 2).

Petitioners do not seek review of the dismissal of their Count V.

II. SUMMARY OF ARGUMENT

Respondents seek a Writ of Certiorari claiming that the rulings below call for an exercise of the Supreme Court's power of supervision. However, there is no need for exercise of such power; the issues raised by Petitioners are not of special importance such that review by this Court is required.

Jurisdiction is based on diversity. Dismissal, on Respondents' Motion for Summary Judgment pursuant to FRCP 56, of Counts I, III and IV of Petitioners' Amended Complaint, was clearly consistent with applicable Michigan law. Petitioners, relying

on *Wronski I*, proposed to use offensive collateral estoppel in lieu of proofs to support their Count I. Both the District Court and the Sixth Circuit Court of Appeals properly found that the facts determined in *Wronski I* were not sufficiently similar to the facts which Petitioners would have to prove in order to prevail on Count I. As to Counts III and IV, the District Court and the Sixth Circuit properly found that collateral estoppel precluded relitigation of the issues decided adversely to Petitioners in the unitization hearings and in the *Wronski II* remand hearing.

The FRCP 11 sanctions imposed by the District Court were not an abuse of discretion. Petitioners offered no evidence showing any investigation (let alone reasonable investigation) of the merits of their now discarded Count V. The procedures before the District Court complied with due process.

III. ARGUMENT

A. NO ISSUE RAISED BY THE PETITIONERS IS OF SUCH A NATURE OR IMPORTANCE THAT THIS COURT'S INTERVENTION IS MERITED.

Rule 10 of the Supreme Court's Rules set forth the character of reasons that this Court considers in reviewing petitions for writs of certiorari. The Petition has failed to present any issue or argument that is even close to meeting the level of significance required to merit this Court's review. In contesting the dismissal of their Counts I, II and IV of their Amended Complaint, Petitioners are merely pursuing unsuccessful attempts to increase their royalty payments from an oil field in which they own an interest.

This aspect of the Petition is entirely controlled by state law. In contesting sanctions entered against them under FRCP 11, Petitioners are merely attempting to avoid payment of a $9,867.50 sanction. None of the rulings of which Petitioners seek review are in conflict with a decision of another United States Court of Appeals or involve important questions of federal law. Rather, Petitioners simply disagree with the judgment and discretion exercised by the District Court and sustained by the Court of Appeals. Accordingly, this Court should deny the Petition on the grounds that the type and character of the issues raised are not of special importance.

B. THE DISTRICT COURT AND THE SIXTH CIRCUIT COURT OF APPEALS BOTH CORRECTLY HELD THAT SUMMARY JUDGMENT DISMISSING PETITIONERS' COUNT I WAS PROPER BECAUSE PETITIONERS–FOR THEIR PROOFS–RELIED SOLELY ON COLLATERAL ESTOPPEL AND SUCH RELIANCE WAS INSUFFICIENT SUPPORT OF THEIR COUNT I CLAIM.

Petitioners claim that the findings and opinion of St. Clair County, Michigan Circuit Court Judge Halford I. Streeter–sustained but modified as to damages in *Wronski I*–establishes that a genuine issue of material fact existed in Count I and therefore, granting of Respondents' Motion for Summary Judgment on Count I was in error.

Petitioners' argument fails to advise this Supreme Court of the legal basis of the District Court's dismissal of Count I. Below the Petitioners had relied exclusively on the doctrine of collateral estoppel to establish their factual allegations in Count I and offered no proof to support their claim other than factual findings in *Wronski I*. District Judge Gadola

found that the factual findings of *Wronski I* were clearly insufficient proof of Petitioners' Count I claim:

> Defendants claim that plaintiffs cannot prove that Sun Oil drained 36,417.5 barrels of oil from Tracts 1, 2 and 6. Defendants point to a lack of expert testimony and to the time and property interest discrepancies between *Wronski I* and the instant case. Plaintiffs state that expert testimony is not necessary to show defendants' wrongdoing and that *Wronski I* is sufficiently similar to the facts in this case to allow the use of offensive collateral estoppel. This court agrees that plaintiffs' experts and the expert testimony used in the Streeter Opinion are insufficient to establish defendants' alleged illegal drainage of oil from Tracts 1, 2 and 6. The use of *Wronski I* in this case is limited because of the time and property interest discrepancies. (R.8, p 11)

The Sixth Circuit Court of Appeals thoroughly reviewed the District Court's ruling and likewise found the factual findings of *Wronski I* fell far short of establishing Petitioners' Count I claim:

> *Wronski I* is conclusive on the finding of the illegal drainage occurring between February 1, 1970 and June 30, 1974; but the parties did not litigate, and the judgment does not establish, the amount of oil drained illegally during November 1, 1971 and June 30, 1974. *Wronski I* also does not establish that a steady stream was pumped from the field, the percentage pumped during any subperiod

> of time within the relevant time frame, or the value of oil drained during any subperiod. Thus, *Wronski I* cannot be used as the plaintiffs' only evidence of the amount of oil drained from the property between November 1, 1971 and June 30, 1974.
>
> Plaintiff have failed to respond to the problem of lack of identity of issues actually litigated, continuing to argue on appeal that no additional evidence is necessary. Without such additional evidence, plaintiffs cannot prove Count I. (R.1, pp 8-9)

In affirming the District Court, the Sixth Circuit properly cited Michigan law which holds that the doctrine of collateral estoppel cannot be invoked in subsequent actions as to issues not "actually litigated" in the first action. See *Knoblauch* v *Kenyon*, 163 Mich App 712; 415 NW2d 286 (1987) and *Howell* v *Vito's Trucking Co*, 386 Mich 37, 41-42; 191 NW2d 313 (1971). (R.1, p 8). Because there was no identity of issues, the decisions of the District Court and the Sixth Circuit Court of Appeals were clearly correct.

Finally, the District Court's dismissal of Count I should be affirmed because Michigan law does not permit the offensive use of collateral estoppel. Petitioners and their predecessors in interest were not parties to *Wronski I*. Thus, Petitioners—because they were "plaintiffs-strangers" to *Wronski I*—were attempting to use collateral estoppel offensively. The Michigan Supreme Court in *Howell* v *Vito's Trucking Co*, *supra*, addressed a like attempt to use offensive collateral estoppel by a non-party and ruled the same could not be done. In *Knoblauch* v *Kenyon*, *supra*,

the Michigan Court of Appeals summarized this ruling of the Michigan Supreme Court:

> The court (in *Howell* v *Vito's Trucking Co.*) completely foreclosed the offensive use of collateral estoppel absent identical parties or their privities in successive civil suits . . ., 163 Mich App, 720. (Parenthetical expression added.)

Dismissal of Petitioners' Count I was fully consistent with and was required by Michigan law.

C. RELITIGATION OF THE ISSUES PRESENTED BY PETITIONERS' COUNTS III AND IV WAS PRECLUDED BY DEFENSIVE COLLATERAL ESTOPPEL.

Petitioners claim that the application of collateral estoppel to preclude relitigation of the issues raised in their Counts III and IV was improper because the remand hearing which developed out of *Wronski II* is now on appeal and, thus, is not a final determination.

The doctrine of collateral estoppel was properly applied for two separate reasons. First, Petitioners and their predecessors in interest are bound by the 1974 state administrative orders unitizing the Columbus "3" Field and establishing each interest-owners' participation percentage in the unitized field (A.12). Secondly, and independent of the foregoing, Petitioner Edgar J. Dietrich and his law firm were counsel for the Koziaras in the remand hearing and, thus, Petitioners are bound by the results of that hearing.

1. Collateral Estoppel was based on the Michigan Unitization Law and the Michigan Supervisor of Wells orders unitizing the Columbus "3" Oil and Gas Field.

In 1973, Sun, Respondents' predecessor in interest, petitioned the Supervisor of Wells, Michigan Department of Natural Resources, to unitize the Columbus "3" Field pursuant to the Michigan Unitization Law. The purpose of the unit was to enhance the recovery of oil through secondary operations by pressure maintenance.

> Unitization is a process which permits an entire field to be operated as a single entity without regard to surface boundary lines. When a field is unitized the owners of property within the drilling range are awarded a royalty interest on the whole of what is produced. *Wronski II*, p 178.[3]

The Michigan Unitization Law contains numerous and rigorous safeguards to protect interested parties such as Petitioners. For example, Section 5 requires that notice be given to all interested parties and a hearing be held before the Supervisor. The hearing is governed by Chapter 4 of the Michigan Administrative Procedures Act, 1969 PA 306; MCL 24.201 et seq; MSA 3.560 (101) et seq. Further, Subsection 4 of Section 5 and Section 6 set forth a series of specific findings of fact which must be made by the Supervisor as a prerequisite to issuing an order for unitization of a field. See Section 6(c), which requires, in effect, that the Supervisor find the tract partici-

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[3] For additional description of unitization and its legal ramifications, see *Amoco Production Co* v *Heimann*, 904 F2d 1405, 1410-1411 (10th Cir. 1990).

pation percentages to be fair, reasonable and equitable. Also, Section 7 then required that the plan for unit operations be approved in writing by 75% of each group of interested parties (this requirement has since been modified). Subsection 4 of Section 5 requires that the Supervisor consult with the Oil and Gas Advisory Board before issuing his order of unitization. Sections 30 through 35, inclusive, provide that aggrieved parties may take an appeal to the Appeal Board and present written and oral arguments. Pursuant to Section 35, the Appeal Board may affirm or reverse the order or remand the same with recommendations. Finally, Section 36 provides for judicial review. Judicial review is governed by Chapter 6 of the Michigan Administrative Procedures Act, MCL 24.301 et seq, MSA 3.560(201) et seq.

Following the procedures outlined above, the Columbus "3" Field was unitized effective June 30, 1974 and Sun became the unit operator (A.12)

The unitization orders recite that due notice was given (A.12, pp 39a, 43a and 44a). Petitioners do not claim lack of due notice, but did not participate in the unitization hearings (R.33, Request 29).

The doctrine of collateral estoppel applies, in Michigan, to administrative determinations such as those that resulted in the unitization of the Columbus "3" Oil and Gas Field.

> It is established law in this state that the doctrines of res judicata and collateral estoppel apply to administrative determinations which are adjudicatory in nature, where a method of appeal is provided, and where it is clear that it was the legislative intention

> to make the determination final in the absence of an appeal. *Senior Accountants* v *Detroit*, 399 Mich 449, 457-458; 249 NW2d 121 (1976).

See also *Nummer* v *Dep't of Treasury*, 200 Mich App 698; 504 NW2d 724 (1993).

For these reasons, the rulings by the District Court and the Sixth Circuit Court of Appeals that Petitioners were bound by the unitization order and could not relitigate the participation percentages assigned to Tracts 1, 2 and 6, are entirely correct (R.1, pp 9-17 and R.8, p 24).

Also, the rulings below are entirely consistent with a series of Court of Appeals diversity cases, all holding that a party whose rights are affected by the orders of a state agency—such as the Michigan Supervisor of Wells—is estopped from obtaining relief inconsistent with the agency orders.

Amoco Production Co v *Heimann*, 904 F2d 1405 (10th Cir. 1990), similar to Petitioners' Count III, addressed Heimann's claim that an oil company had breached its "good faith" duty in connection with a unit formed to produce carbon dioxide. In this case, the landowners, the Heimanns, had consented in their lease with Amoco to formation of the unit.[4] The unit had been formed pursuant to procedures before the New Mexico Oil Conservation Commission similar to the Michigan Unitization Law discussed above. The Tenth Circuit Court of Appeals reversed a district

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[4] The Heimanns had obtained a rehearing before the New Mexico Commission and had litigated the unit before the New Mexico courts, 904 F2d at 1418.

court opinion holding the unitization of the Heimann lands void. The Tenth Circuit ruled:

> Therefore, we hold that where a state administrative agency, empowered to rule on the fairness of unitization plan and entitled to full faith and credit by a federal court, finds that a proposed unitization adequately protects the correlative rights of all interested parties, said approval is conclusive on the issue of good faith. 904 F2d at 1414.

The Tenth Circuit concluded that the Heimanns were estopped from collaterally attacking the unitization order.

Katter v *Arkansas Louisiana Gas Co*, 765 F2d 730 (8th Cir. 1985) shows that the proceedings by the state regulatory agencies are *in rem* and that interested parties, like Petitioners, who fail to participate in the state agencies are precluded from a collateral attack. In this case the landowners, the Katters, were in Lebanon during the state agency proceedings. Notice was sent to the Katters in care of the American Embassy in Lebanon, which notice the Katters denied receiving. A second notice was sent to the Embassy advising the Katters of their two options upon the formation of the unit. This second notice was received by the Katters but the Katters did not respond in a timely manner, resulting in the first option of two options being "assumed" to be elected by the Katters. 765 F2d at 732. The Katters did not attempt to set aside the unit but sought money damages (as under the circumstances the second option would have been more beneficial), as do Petitioners in this case. The Eighth Circuit reviewed the applicable Arkansas statute and concluded:

> Clearly the Arkansas legislature intended an adjudicatory, *in rem* order which, when final, would have all the force and effect of a court judgment; and in fact required and provided for all things necessary to give it that effect. In general, then, such an order would fix the party's rights and duties as fully and finally as a court judgment—*albeit here a default judgment*[5]—and should be entitled to the same full faith and credit and preclusive effect. 765 F2d at 734. (Emphasis added; Citations omitted).

A like result was reached in *Trahan* v *Superior Oil Company*, 700 F2d 1004 (5th Cir. 1983). The Trahans sought cancellation of an oil and gas lease on their property or damages on account of drainage. The Trahans claimed that Superior Oil Company had knowledge that the productive formation extended into their lands but failed to include the lands in an offsetting unit approved by the Louisiana Commission for the Greene Well. Similar to *Amoco* and *Katter*, the Trahans were precluded from litigating their claim as the same constituted an impermissible attack on the order of the state commissioner. 700 F2d at 1025.

The Fifth Circuit Court addressed and dismissed the Trahans' claim that they were not making a col-

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[5] Under Michigan collateral estoppel principles, a default judgment is just as conclusive as adjudication and as binding upon the parties of whatever is essential to support the judgment as one which has been rendered following a full evidentiary contest. *Perry & Derrick Company, Inc* v *King*, 24 Mich App 616; 180 NW2d 483 (1970); *Rohe Scientific Corp* v *NBD*, 133 Mich App 462, 467; 350 NW2d 280 (1984).

lateral attack on the commission order because they were seeking money damages and not attempting to set aside or to modify the order. The Fifth Circuit ruled that the prohibition against collateral attack was not so restricted:

> Rather, the rule also extends to suits between private parties in which a particular order of the Commissioner is an operative fact upon which the determination of the parties respective rights directly depends, even though all relief sought can be given, such as by money damages or lease cancellation, without thereby causing any actual violation of the Commissioner's order. 700 F2d at 1015 and 1016.

Thus, it is irrelevant that an award of money damages—as sought by Petitioners—may not have a direct effect on a unitization order. Rather, collateral estoppel attaches to a unitization order to bar the relitigation of issues.

For additional case authority holding that orders of oil and gas boards or commissions are not subject to collateral attack, see *Mize* v *Exxon Corporation*, 640 F2d 637 (5th Cir. 1981) and cases cited therein at page 640.

2. Application of Collateral Estoppel was also required because of Petitioner Edgar J. Dietrich's participation as counsel for the Koziaras in the Remand Hearing before Administrative Law Judge Fulkerson.

Respondents emphasize that Petitioner Edgar J. Dietrich personally and through his law firm represented the landowners Koziaras throughout the *Wronski II* remand hearings (R.33, Requests 58 and 59),

the results of which are now on appeal before the Michigan Court of Appeals. As stated by the Sixth Circuit Court of Appeals, all aspects of Counts III and IV were addressed and conclusively determined by Administrative Law Judge Fulkerson's Proposal for Decision (A.1, pp 16-17). As a result, under Michigan law, Respondents are estopped from relitigating those issues.

As developed above, *Howell* v *Vito's Trucking Co*, *supra*, 386 Mich 37; 191 NW2d 313 (1971) prohibits offensive collateral estoppel absent mutuality. *Howell* also shows that Michigan does permit, under certain circumstances, defensive collateral estoppel absent mutuality. The following appears at footnote 7, page 47:

> As observed by the commentator in 31 ALR 3d 1044 at 1072, "The courts are more inclined to permit the defensive than the offensive, use of the doctrine of collateral estoppel." In line with this general authority, see our Court's comments and holding in *Walz* v *Reliance Insurance Co. of Philadelphia* (1922), 221 Mich 345, quoted with approval in *DePolo* v *Greig*, *supra*, at 712.

In *DePolo* v *Greig*, 338 Mich 703, 709-713; 62 NW2d 441 (1954), the Michigan Supreme Court allowed the president and the principal stockholder of a corporation to plead defense collateral estoppel, based on a prior action brought by the same plaintiff against the corporation wherein the corporation had been exonerated.

In *Halvorsen* v *Grain Dealers Mutual Insurance Co*, 210 F Supp 73 (W.D. Mich 1962), Phyllis Jones had

won a judgment against Reva Halvorsen for injury suffered in an automobile accident. Thereafter, Reva Halvorsen sued Edward Jones, father of Phyllis and owner of the vehicle which Phyllis was driving. Edward Jones was allowed to plead defensive collateral estoppel based on the former adjudication which exonerated his daughter Phyllis of negligence.

There are a series of Michigan cases holding that defensive collateral estoppel can apply, absent mutuality, in attorney malpractice cases. See *Alterman* v *Provizer*, 195 Mich App 422; 491 NW2d 868 (1992)—cited by the Sixth Circuit Court of Appeals (R.1, p 14)—and the cases cited therein. In *Alterman*, the attorney had advised his client to settle a work related injury. Later and with a new attorney, the employee sought to set the settlement aside claiming mental incompetency. The following court proceedings found that the employee was competent and upheld the settlement. The employee then sued his first attorney for malpractice for settling the claim while the employee was incompetent. The Court of Appeals allowed the defendant attorney to invoke defensive collateral estoppel despite the absence of mutuality. See also *Knoblauch* v *Kenyon*, *supra*.

In effect, Respondents—after having participated as counsel for the Koziaras in the remand hearings and being dissatisfied with the outcome of that proceeding—sought to relitigate the issues in this action.

Admittedly, the Fulkerson Proposal for Decision is now on appeal before the Michigan Court of Appeals. However, it has not been set aside, modified, or remanded for further proceedings. Under Section 106 of the Michigan Administrative Procedures Act, agency findings of fact are conclusive if supported by

competent, material and substantive evidence on the whole record, *Halm* v *Board of Education of Dansville Agriculture Schools*, 174 Mich App 520; 436 NW2d 680 (1988).

Michigan case authority clearly demonstrates that an order pending on appeal nevertheless has preclusive effect:

> The rule in Michigan is that a judgment pending on appeal is deemed *res judicata.*[6] *City of Troy* v *Hershberger*, 27 Mich App 123, 127; 138 NW2d 420 (1970).

Petitioners cite no contrary authority to support its position that a party may proceed to trial and relitigate precluded issues because there is a pending appeal of the administrative hearing where the precluded issues were first addressed.

Dismissal of Counts III and IV, likewise, was fully consistent with and was required by Michigan law.

D. THE FRCP 11 SANCTIONS IMPOSED WERE NOT AN ABUSE OF DISCRETION.

Petitioners cite FRCP 54 and argue that the sanctions were an abuse of discretion because of a reasonable belief that their motion to amend or clarify their pleadings would be granted. No factual basis for

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[6] *City of Troy* v *Hershberger* predates *Howell* v *Vito's Trucking Co*, *supra*, wherein the Michigan Supreme Court first clearly distinguished the related doctrines of res judicata and collateral estoppel. See 386 Mich at 41-42. The Michigan Court of Appeals in *City of Troy* used the term "res judicata", but at page 127 cited a "rule" which encompasses both concepts. Accordingly, the above quotation applies equally to the doctrine of collateral estoppel.

such alleged reasonable belief is given and FRCP 54 is not germane. As shown above in Respondents' Statement of the Case, Petitioners sought to amend the Joint Pretrial Statement, not their pleadings.

Such amendments are governed by FRCP 16(e), reading:

> After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Petitioners, likewise, offer no factual basis to support a claim that amendment to the Joint Pretrial Statement was required to prevent manifest injustice.

Petitioners claim:

> Appellant's [sic] counsel attempted to rectify *a technical defect* by filing a motion to amend to broaden the specified time period within which Appellants [sic] reasonably and objectively believed that Appellees [sic] wrongfully produced oil. (Petition, p 20)

Contrary to Petitioners' characterization in their Petition, the motion was not so viewed by Respondents, by the District Court, or by the Sixth Circuit Court of Appeals as a mere attempt to remedy a technical defect. Petitioners sought to enlarge the time period during which the unlawful activity was alleged to have occurred from a precise and definite time period of between November, 1984 and March,

1985 to an expansive and unspecified period. The District Court commented:

> Further, the tactic of plaintiff in filing their motion on the eve of trial to state an entirely different claim than they had been asserting since the filing of their amended complaint of April 11, 1988, was reprehensible and unacceptable. Viewing this motion against the backdrop of the history of this case, this court can only surmise that it was intended to either be a surprise tactic or at least a delay tactic. Therefore, this court did not allow plaintiffs' amendment on the morning of trial, with a jury having been selected and ready to hear the case, because it would have worked substantial injustice upon defendants who have adequately prepared for trial over the five years this case had been pending, on the basis that they were defending a claim of oil allegedly taken without compensation between November 1984 and March 1985. This would have presented defendants with the prospect of defending against an entirely different claim, with possibly different defenses, including, as defendants counsel correctly pointed out in oral argument on July 2, 1992, the defense of the statute of limitations. (R.4, p 10)

The Sixth Circuit Court of Appeals commented:

> As such, this was not a "technical defect" of which plaintiffs were unaware. Plaintiffs have established absolutely no abuse of dis-

> cretion on the part of the district court in imposing these sanctions. In fact, the record reflects that this is exactly the type of case for which Rule 11 sanctions are appropriate. (R.1, p 29)

Petitioners' arguments fail to address the fact that sanctions were imposed for pursuit of a factually unsubstantiated claim. FRCP 11 reads, in part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed *after reasonable inquiry it is well grounded in fact* and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. (Emphasis supplied)

Petitioners do not now offer, and did not offer below, any exculpatory evidence showing reasonable investigation of the now discarded claim that surreptitious oil production occurred between November 1984 and March 1985. More to the point, Petitioners do not undertake to explain why they knew on the first day of trial (July 2, 1992) that they had no proofs, but for the 5-1/2 years that the claim was previously pending were unaware of such lack of proofs. See Petitioners' Answer to Motion for FRCP 11 Sanctions and Brief in Support of Answer to Motion (A.14).

E. THE ADMINISTRATION OF FRCP 11 SANCTIONS IN THIS CASE COMPLIED WITH DUE PROCESS.

Petitioners conclude with a policy argument based on a perceived prejudice which they claim is inherent when the presiding trial judge rules on a motion for sanctions. Petitioners suggest, in "serious cases" (a sanction of $2,500 or more), that use of a three judge panel is necessary to avoid such perceived inherent prejudice and any appearance of unfairness.

The history of this case renders Petitioners' plea for more due process a bit hollow. In addition to the fully justified FRCP 11 sanctions, Petitioners were also sanctioned below for obstruction of discovery. The factual history leading to these discovery sanctions is outlined in the District Court Opinion and Order Granting Sanctions (R.3, pp 3 - 5) and begins:

> The history of this case would not be complete without an overview of the extreme litigiousness and delay that has occurred because of the actions of plaintiffs and plaintiffs' counsel.

Petitioners do not address the requirements of due process applicable in FRCP 11 proceedings based on *Mathews* v *Eldridge*, 424 U.S. 319; 96 S. Ct. 893; 47 L. Ed. 2d 18 (1976) and addressed in *Donaldson* v *Clark*, 819 F2d 1551 (11th Cir, 1987). In fact, Petitioners did not, before the District Court, request a hearing, but rested on their Answer to Motion for FRCP 11 Sanctions (A.14). Furthermore, as shown above, Petitioners did not offer evidence of due investigation into the merits of Count V. Nor did Petitioners raise this due process issue before the Sixth Circuit Court of Appeals. Rather, Petitioners

raised frivolous technical objections (i.e., lack of jurisdiction and lack of a continuing obligation to review each pleading or paper filed) and attempted to relitigate the District Court's findings (R.3, pp 6 and 7). Accordingly, the Petitioners possess no right to seek "review" of this due process issue at this late date.

Overlooking the above, Petitioners' suggestion of a three judge panel, even if otherwise authorized, runs counter to the established practice in FRCP 11 proceedings. Use of three judge panels would increase the use of the judicial system and the fiscal and administrative burdens. This Supreme Court, in *Mathews*, and the Eleventh Circuit Court of Appeals in *Donaldson* have both acknowledged that the procedural safeguards to be afforded must be weighed against the resulting costs. See *Mathews*, 429 U.S. at 335 and the similar statement in *Donaldson*:

> The specific dictates of due process will be determined by the interaction of several factors. These factors include but are not limited to: the interests of attorneys and parties in having a specific sanction imposed only when justified; the risk of an erroneous imposition of sanctions under the procedures used and the probable value of additional notice and hearing; and the interests of the court in efficiently monitoring the use of the judicial system and the fiscal and administrative burdens that additional procedure requirements would entail. (819 F2d at 1558)

Finally, we should comment that in a truly serious case the criminal contempt procedures of Rule 42(b) of the Rules of Criminal Procedure may be applicable. The *Donaldson* Court stated:

It is not necessary to follow the procedures required in criminal contempt proceedings in every case to insure that the imposition of a monetary sanction is justified; less extensive procedures will generally protest the individual interests involved without undermining Rule 11. (819 F2d at 1559)

IV. CONCLUSION

The Petition should be denied.

Respectfully submitted,

LOOMIS, EWERT, EDERER, PARSLEY, DAVIS & GOTTING, P.C.
Attorneys for Respondents
RODGER T. EDERER (P13100)
(Counsel of Record for Respondents)
GARY L. FIELD (P37270)
232 South Capitol Avenue,
Suite 1000
Lansing, Michigan 48933
(517) 482-2400

Dated: August 29, 1994

APPENDIX

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STATE OF MICHIGAN

Before the Department of Natural Resources

In Re: Koziaras v Sun Oil Company

Proposal for Decision

William C . Fulkerson
Administrative Law Judge

This matter, is before the Supervisor of Wells pursuant to the Order of the Ingham County Circuit Court. The hearing was conducted pursuant to The Michigan Unitization Act, 197 PA 1959, as amended. The parties to the hearing were the Koziaras and Sun Oil Company. At the time of the remand Patrick Petroleum Company and the Wronskis were parties to the proceeding who subsequently reached a settlement and did not participate in the hearing. The hearing record is in two phases. The first is the record of proceedings before the Supervisor of Wells at the May 15, 1973, and subsequent hearings which culminated in the Order of Supervisor of June 25, 1974 (effective June 30, 1974). The second phase is the appeal of the Wronskis and Koziara of the Supervisors Order which culminated in a nine-day hearing.

Historical Background

The Koziaras own an interest in and Sun Oil Company is the operator of the Columbus #3 field. The Columbus #3 field is approximately two and one-half miles long and one-half mile wide located in Sections 3 and 10 of Columbus Township and Section 34 of Wales Township, St. Clair County, Michigan. The field was discovered in November of 1968. A total of 39 wells were drilled during the development of the field. Sixteen of those wells were dry and unproductive. Twenty-three were productive of gas and oil. The Columbus #3 pool is a Salina-Niagaran reservoir. The productive reservoir is a reef which was part

of an ancient sea. The wells are productive of both gas and oil from the Brown Niagaran. The productive interval is at a depth of approximately 3,000 feet below the surface.

In March of 1973, Sun Oil Company petitioned the Supervisor of Wells for the unitization of the Columbus #3 field. The Unitization Proposal was that all produced gas would be reinjected into the producing formation together with some additional water. The purpose of the reinjection is to maintain reservoir pressure and energy allowing for a greater percentage of recovery of oil and gas in place.

The unit operations would convert some producing wells to injectors where gas or water would be reinjected to the producing formation. Other producing wells would be allowed to produce at a higher rate than currently allowable. Oil that is recoverable by conventional means through pumpage or natural flow on each drilling unit is called Primary Production. The proposal of Sun Oil Company was for secondary recovery or enhanced oil recovery. According to Sun's calculations, an additional 2.3 million barrels of oil would be recovered by engaging in enhanced oil recovery. As previously stated, in order to enhance recovery there must be some form of pressure maintenance or increase in reservoir energy to force an incremental amount of oil out of the reservoir. When this is done the field can no longer be operated as it was in the past with each landowner having a well on their own tract. Some of the wells will be produced, others will be converted to injectors. Additional gas or water would be injected into the Salina-Niagara Group reservoir rocks for pressure maintenance. The tracts with injector wells would no longer produce gas or oil. In order to accomplish secondary recovery it is necessary to reach an agreement among the various owners as to how the benefits and burdens of this different operation will be shared. The typical method for conducting these types of operations is for the operators to meet and propose a plan for the unitized operation of the field. Of particular importance to the agreement for

unitization is the determination of a participation formula. This formula determines how the proceeds of unit production and the corresponding expenses shall be allocated to the various tracts. Upon the execution of an agreement for unitized operations and a plan for unitization by requisite percentage of working interest and royalty owners, a plan may be submitted to the Supervisor of Wells who has the power to order the implementation of the unit and join non-consenting interests into the plan.

On May 15, 1973, the Supervisor of Wells conducted a hearing to review the technical feasibility of Sun's proposal for unitization and secondary recovery from the Columbus #3 pool. Part of the hearing related to the fairness of the participation formula to which non-consenting owners would be subjected. At that time Sun Oil Company did not have the requisite percentage of royalty interests to invoke the power of the Supervisor to join the non-consenting interest. Therefore, a supplementary hearing was scheduled limited to the issue of the percentage of consents, culminating in a June 25, 1974 Order of the Supervisor of Wells. This Order adopted the plan of unitization, found the proposal feasible, and in compliance with the various statutory criteria for unitization and ordered the unit effective June 30, 1974. The unit has operated since that date. Following the hearing both Mr. Wronski and Mr. Koziara appealed the Order of the Supervisor pursuant to the Michigan Unitization Act.

Over the next several years Circuit Court litigation ensued between the parties to this proceeding. This litigation resulted in a determination by the St. Clair County Circuit Court, and ultimately substantially adopted by the Michigan Court of Appeals, that Sun Oil Company had systematically over-produced certain wells in the Columbus #3 field to the detriment of the plaintiffs and awarded damages accordingly. This case is now on remand from the Ingham County Circuit Court with the Supervisor obli-

gated to make findings as expressed in the Court's Order as follows:

> 3. Upon the completion of such procedures, the Supervisor of Wells shall promptly file with this Court and serve on the parties a report containing findings of fact as to:
>
> (a) The extent, if any, to which any well in the Columbus "3" Salina-Niagaran Formation Pool was, in the months of October, November and December, 1971, produced in excess of the daily oil allowable per producing well as specified in the Department of Natural Resources, Supervisor of Wells, February 1, 1970 Proration Order, and in violation of the applicable rules, regulations and approved practices governing production of oil fields subject to proration.
>
> (b) The participation percentages allocated to Plaintiff Wronskis' Tract No. 7 and to Plaintiff Koziaras' Tract No. 6 pursuant to the formula contained in Article 5, *Tract Participations*, of the Columbus "3" Unit Agreement if the overproduction, if any, found pursuant to subparagraph (a) is excluded in the application of such formula.
>
> (c) Any other matter which plaintiffs or defendants demonstrate is relevant to establishment of royalty percentages to which plaintiffs and/or defendants are entitled. Any "other matter" set forth herein shall include the matter,s set forth in the Offer of Proof attached as Exhibit I to Plaintiffs Wronskis' Motion and Affidavit in support thereof dated February 4, 1983, and filed in this case and such similar, type proofs as may be offered on behalf of the Plaintiffs Koziara. Defendants Sun

Oil Company and Patrick Petroleum Company may submit relevant proofs in opposition to such matters submitted by Plaintiffs.

In the preparation of this Proposal for Decision, I have reviewed the record of the original hearing, all Exhibits, and testimony from the second hearing, including all briefs and writings filed by the parties.

FINDINGS OF FACT

Fourth Quarter 1971 Production

The unitized operation of a field for oil and gas results in commingling of the oil from the various tracts of land which make up the unitized area. It is necessary to arrive at a formula for distribution of produced products that will allocate to each separately owned tract their fair and equitable share of the proceeds. The participation formula selected for the Columbus #3 unit has two components. The first component of the formula was that each tract was to be given credit for the production from their wells for a given period of time, specifically, the fourth quarter of 1971, divided by the total production of the field for that period of time. The second component of the formula is oil and gas porosity acre feet for each tract divided by the total porosity acre feet for the entire field. Within the porosity acre of feet calculations a weighted formula was used giving greater value to oil porosity feet than gas porosity feet as a reflection of the disparity in value between the two products. The formula then gave credit 60% to the production phase, 40% to the porosity acre of feet portion.

At the time the unitization was ordered the Columbus #3 field was a prorated field. This means that allowable production rates were established for the wells to preserve reservoir energy and gain the maximum oil recovery from the reservoir. By a proration order the maximum amount of oil and/or gas to be produced by each well was estab-

lished. The limit established by the Supervisor of Wells Order of January 27, 1970, was 75 barrels of oil and/or 100,000 cubic feet of gas. The allowable production rates for each individual well were established by gas/oil ratio tests. For example, a well that would produce 100,000 cubic feet of gas and 10 barrels of oil per day would not be allowed to produce more than the 10 barrels of oil per day.

A well that could produce 75 barrels of oil and only 10,000 cubic feet of gas would not be allowed to produce any more than the amount of gas that came along with 75 barrels of oil. At the time of the unitization the gas from the field was being flared. This means that the gas was burned. According to the testimony of Sun's witnesses at the original hearing the field only produced about 500,000 cubic feet of gas per day of which about 100,000 cubic feet was used to operate lease equipment. They estimated a capital expenditure of $165,000 would be necessary to market the gas. Therefore, on the basis of the uneconomical gas production, the operators were allowed to flare their gas in the field.

The St. Clair County Court in the litigation between the parties found that the Sun Oil Company had produced several of their wells at greater than the allowed 75 barrels per day rate to make up for wells that were poor producers. The resultant excess production was then assigned back to the poor producers as though the proration order had not been violated. The Court found that the wells had been overproduced in the time period between February 1, 1970, and June 30, 1974. The Court found a specific amount of oil that was overproduced. The Court further found that false records were filed by Sun Oil during that same period of time. It is my opinion that the parties are bound by the findings of Judge Streeter in the St. Clair County Opinion.

Plaintiff Koziara has urged from the start of the proceeding that if production is to be a component of the formula, then we must remove the illegal oil from the overproduced leases and add that oil to the Koziara's properties. According to the testimony of Mr. Lorenz, a Geology witness for plaintiff, 2,061 barrels of oil should be added to the Koziara's tracts. He then would subtract the 2,061 barrels from the Winn lease. This approach divides the illegally produced oil by the number, of quarters and then allocates it to a given quarter. The then derived overproduction would be added to Koziara's lease and subtracted from the overproduced lease. These new figures would then be incorporated into the participation formula yielding a new participation formula for the tracts involved.

There are a number of reasons why this simplistic approach is inappropriate. The first and most compelling reason is that the St. Clair County Circuit Court did not allocate any amount of overproduction to any specific time period within the three plus years that the Court found overproduction. If the overproduction were added to the production credited for the fourth quarter of 1971 then the Koziara wells would be overproduced by 13% over the established allowable. The reason that current production is incorporated into an allocation formula is that it is reflective of the wells current capabilities for production. Since the Koziara wells were produced very near their allowable it would be an unfair advantage over all other tracts to credit a production amount greater than that allowed by the proration order. It is my opinion that an approach such as that suggested by plaintiff Koziara is entirely artificial and has no relationship to the productive capability of the wells. If the formula were based on cumulative production, the addition of overproduced oil might be appropriate. However, this approach too is unfair in that all tracts within the unit would have had to have a

similar opportunity to overproduce so their cumulative oil could be larger.

I have reviewed all of the production records and various exhibits relating to the production from wells during the fourth quarter of 1971. I find that the gas/oil ratio test establishing the production levels for each well are reliable. The St. Clair County Circuit Court based their determination of overproduction on gas/oil ratios. There were no findings by the St. Clair County Court that the gas/oil ratios were unreliable and they were used by the Court to calculate overproduction. The allowables were set by this Agency following an Administrative Hearing. This Agency is mandated to prevent waste and to allow each operator in the pool to produce their fair and equitable share. The gas/oil ratio tests determine the amount of oil and gas that can be produced without waste of reservoir energy.

The allowable production for all wells in the Columbus #3 field for the fourth quarter of 1971 was 102,844 barrels of oil. The reported production used in the participation formula for the same period of time was 101,793 barrels of oil. The actual production figures are very near the allowable production level. If allowable production levels were substituted for the production records, the difference would be negligible. In the case of the Koziara interest it would cause a decrease in their percentage of the fields production. I, therefore, conclude that the production figures used are reflective of the capability of the individual wells and represent the fair and equitable share of reservoir energy and products. The production figures reported by Sun Oil during the fourth quarter of 1971 appear to be reflective of the individual wells capability. These records reflect no illegal overproduction. They do reflect that permission was granted for wells including the Koziara wells to make up production lost as a result of a pipeline blockage. The records show that four wells did poorly as expected, the good wells performed well and

that certain wells were shut in during that period of time. It is my opinion that the production figures used in the participation formula are in fact representative of the capabilities of the well and closely parallel the amounts set as production allowables for the wells. I therefore find that the overproduction found by the St. Clair County Court does not require an adjustment or the percentage attributable to the Koziara tracts on the basis of production. If it does require an adjustment, it is negligible and I would suggest in the alternative that the percentages derived from field proration allowables be used in its place. If this were the case, Mr. Koziara's percentage would be reduced from 13.539% of reported production to 13.41% of field proration allowable production. In light of the negligible difference it makes no sense to me to adjust the production portion of the formula at this late date.

Porosity Acre Feet

The second component of the participation formula is 40% porosity acre feet. In simple terms, this is an expression of how much space is available to contain oil or gas under a given tract of land. The Columbus #3 field is fairly well defined. That is, there were 39 wells drilled in the field, 16 of them were dry holes and 23 were producers. Each well drilled yields information about the geologic conditions of the reservoir. The precision with which the reservoir can be defined is directly proportional to the number of wells drilled into it. Each well brings new knowledge to be used in assessing the various parameters of the reservoir. This reservoir is a Salina-Niagaran reef. Organic material of this ancient marine reef, through lengthy chemical and physical processes, has become hydrocarbons. The Brown Niagaran hydrocarbon bearing portion of the reef is overlain with impervious layers of salts and carbonates. The origins of the hydrocarbon and structure of the reef are biological in nature. The reef mass is heterogeneous. This is in contrast to a reservoir that is of mechanical

origin, such as, a fault. All available data is used in order to evaluate the reservoir. Each well bore that penetrates the structure yields additional knowledge. Even dry holes yield useful information in terms of delineating the edges of the reservoir. The wells yield information only to the extent of the few inches the diameter of the drill bit encompasses and some additional radial distance reflected in electric logs run in the wells. In this field most of the wells were cored. When wells are cored a special drill bit is used that causes a cylinder, called the core barrel, to cut a continuous length of rock from the interval drilled. This yields a continuous sample of the rock penetrated. The cores are taken to a laboratory and analyzed to determine porosity, permeability, and other rock characteristics. The electric logs involve the sending of instruments along a wire line down the well bore which send out various kinds of signals and measure the values returned from the adjacent rock. Depending upon the type of log various types of information can be gathered.

Since cores were taken of most welts the primary source of data was the core analysis. In the determining of porosity acre feet, the process is to determine the number of feet of productive well bore which has a porosity greater than 5% and then determine the average porosity for the productive zones. As previously stated, these reservoirs are not homogenous. This means that porosity is not continuous, but random. For example, a well may have 10 feet of highly porous rock, the next few feet may be less than 5% porosity, followed by several feet which may again be highly porous. The porosity feet figure gives a relative value for the reservoir with which to compare the various wells. The end product is a net productive reservoir relationship between wells. The determination of net porosity feet is not a simple matter. This reef is to some extent water filled. The porous zones within the reservoir which are water filled are not capable of producing oil or gas. Therefore an oil/water contact must be determined, and

the porosity feet below the oil/water contact are not considered as productive reservoir. The participation formula also distinguishes between reservoir that is oil productive and reservoir that is gas productive. Again, a determination must be made of the gas/oil contact. The porosity feet above the gas/oil contact are gas bearing, below the gas/oil contact is the oil bearing zone. The change from water to oil and oil to gas is not always clearly defined and smooth. Sometimes it is difficult to determine the precise point at which one media changes to another. The term "transition zone" is used to express that area between oil and water or, oil and gas. The primary method of determining porosity feet used in this field was by core analysis.

The participation formula credited each well with its porosity acre feet. The prior calculations yield porosity feet which is the height of productive interval multiplied by the average porosity for that height. To determine porosity acre feet it is necessary to interpret between the various well bores and contour the porosity feet values. The contouring of various values on a base map yields isopach maps.

These contour maps can then be measured and a value given to the amount of acres within a given contour line. The use of contour maps in oil and gas reservoir study is common. It is a well recognized and accepted tool. There was no issue in this case as to the use of porosity acre feet determinations derived from the making of a contour map. In fact, I know of no other method to determine the porosity acre feet. The dispute at hand concerns the calculated values for height and porosity assigned to each well and the placement of the contours between wells. A change in height or movement of contours can cause substantial differences in the resultant porosity acre feet calculations.

That is not to say that plaintiff Koziara agrees that porosity acre feet is the best method for determining oil in place. It was their opinion that oil in place calculations should be made and oil reserve figures used to distribute production. It was their belief that the most fair and equitable method for distribution of the proceeds of unitized operation is a formula weighted 100% oil in place.

At the original unitization hearing Sun Oil Company offered a number of exhibits. These exhibits included geological cross-sections and various contour maps. Among those maps were a Brown Niagaran thickness map, oil and gas porosity contour maps, oil and gas net pay isopach maps, and oil and gas porosity feet maps. The oil and gas porosity feet isopachs were used in the participation formula, the other exhibits were not.

A careful review of all of the data and maps assembled by the parties reveals that the similarities of their conclusions are more marked than the dissimilarities. The substantial divergence as to the interpretations comes about when the data obtained from drilling the Koziara Tract 6 #3 well is reviewed. This well was drilled in 1983. There is no testimony in the record as to why this well was drilled approximately a decade after unitization had commenced. Each party views the results from the 6-3 well as a vindication of their respective positions.

Sun Oil is of the opinion that the well encountered geologic reservoir conditions reasonably within the range that their contour maps predicted. The plaintiff Koziara views the well as clear evidence of the presence of much greater reserves of oil than those credited to him by Sun's calculation. The compelling aspect of the 6-3 well, from the point of view of this Agency, is that the well did not exist at the time of unitization. The well could not have contributed any data to the original calculations. As previously discussed, this Niagaran Reef is of biological origin with porosity and permeability being random and not uniform.

Each well drilled gives accurate data as to the well bore location. Between well bores data must be interpretative. Therefore, were each of the owners of a tract within the unit given the opportunity to drill a well, they too would have additional data which may improve or depreciate the relative value of their tracts. It would both be unfair, and inequitable to utilize the 6-3 data to alter the interpretations of the productive reservoir.

The testimony concerning the 6-3 well was both long and involved. Every aspect of the 6-3 well was examined in great detail including the drilling, logging, and core analysis. Without exception every component of the data concerning the 6-3 well is in dispute. Drilling on the well commenced on August 19, 1983. On August 27, 1983, at a depth of 2,996 feet a lost circulation zone was encountered, and the drill bit dropped approximately five feet. At that time gas came to the surface and was flared until the well could be killed. It is the contention of the Plaintiff Koziara that Sun Oil Company pumped cement down the well to close off the loss of circulation zone. Mr. Koziara testified that he saw something pumped down the well. He further testified that during coring operations, following the resumption of drilling, part of the core was a cement plug drilled out from the lost circulation zone. He further testified that he saw an employee on the rig take a piece of core from the core rack and put it in his truck. Mr. Koziara also took samples from the shale shaker that he had analyzed; Plaintiff's Exhibits 35 and 36. He believes these analyses show that the material drilled was cement.

In contrast, the records of Sun Oil Company of the drilling and of the materials placed in the hole do not reveal any cement was placed in the lost circulation zone. The records of Sun Oil show that brine gel, cotton hulls, and Quick Seal were added to the well. These are the types of materials that would be expected to be placed in a lost circulation zone. The use of cement in lost circulation zones would be highly unusual. The purpose of lost cir-

culation material is to fill the pores of the rock close to the well bore. The materials placed in the hole are specifically designed for that purpose. There is no indication in the record that there was anything unusual about the lost circulation zone that would require extraordinary measures. While the encountering of lost circulation zones is not particularly common, it also is not that unusual. There are many places in the state where lost circulation zones are routinely encountered. The standard oil field practice is to treat these zones with lost circulation material. Additionally, if the loss zone is severe, a liner or casing may be placed over the zone to secure it. This was not necessary in this case. Open hole electric logs were run by Schlumberger on the 6-3 well; Sun Exhibits C and B. Those logs are consistent with a lost circulation zone or washout in the well bore. The response of the logs from 2,996 to 3,002 feet is inconsistent with the presence of cement in the bore hole which was drilled out. For example, the purpose of a caliper log is to show the condition of the hole. A caliper log is a tension device that rides along the edges of the hole and expands and contracts with the size of the hole. The caliper log shows a marked difference in hole size at the 2,996 foot depth. If the well had been filled with cement and drilled out, the side of the hole should be smooth. In light of the foregoing, it now becomes necessary to address Mr. Koziara's contention that the laboratory anaylsis reveals the presence of cement. It is interesting to note that the Laboratory report in addition to the chemical composition identifies sample #1 as pure dolomite and sample #2 a foreign substance. This is highly unusual. Dolomite is carbonate sedimentaly rock that may vary considerably as to mineral content within a reef. The conclusion that the cuttings are pure dolomite is suspicious.

There is nothing in the record to indicate the composition of cement used for oil field purposes. There also is nothing in the record to indicate the chemical composition

of Quick Seal. The conclusion that the well was cemented is not credible for a number of reasons. First, it is not a typical oil field practice to cement lost circulation zones. Second, the records made contemporaneous with the event all indicate the type of material that was placed in the hole. This material was the material expected to be used in a lost circulation zone. The electric log responses are entirely consistent with a lost circulation zone. The Laboratory reports are inconclusive. In order to agree with the proposition that cement was placed in the well it would be necessary to find that Mr. Gunn had lied under oath. I make no such finding. As to the core that Mr. Koziara claimed was removed, I find this testimony to be highly speculative in view of the fact I have just found there was no cement placed in the well bore. A review of the description of cores will show that some are light tan to white as Mr. Koziara described. Had Sun Oil used cement to block off this zone of less than six feet it probably would have made a minimal amount of difference. Because there was no core recovered and the logs are unreliable in the washed out zone, if that zone had been cemented, there would be no more available data than in the absence of the cement. There was no reason to cement the well bore and no benefit to be gained by concealing it.

The parties also differed over the net oil pay and porosity found in the 6-3 well. The available data from which to assess the porosity feet and gas porosity feet present in the well are the driller's log, the core analysis, and the electric logs. It should be noted that Mr. Lorenz was not provided the complete core analysis until after he had completed most of his work, and therefore he did not incorporate the results in his study. The principle point of disagreement is the selection of a gas/oil contact. The gas/oil contact is that point at which the oil phase is no longer predominately present in the reservoir and gas is present to the top of the reservoir. Mr. Lorenz found the oil/gas contact to be at minus 2,992 feet. Mr. Gunn, Sun's well

site geologist, found the gas/oil contact to be minus 3,046 feet. Mr. Cottrill, a geologist consultant to Sun, found the gas/oil contact to be minus 3,059 feet and Core Laboratories who did the core analysis found the gas/oil contact to be at minus 3,048 feet. Mr. Lorenz found that the average porosity for the oil section was 19.16%. Mr. Cottrill found it to be 13.13%. The significant difference in their analysis is the selection of a gas/oil contact. I find that the gas/oil contact of minus 3,048 feet selected by Core Laboratories is the most reliable. The analysis is based upon an actual physical examination of the rock and its properties. At the time of drilling the 6-3 well the secondary recovery operation had been underway for nine years. During that period of time large quantities of oil had been produced and large amounts of gas had been reinjected. Therefore, the reservoir fluids would not be present at the levels expected when the reservoir was originally drilled. Even though a substantial amount of oil present in the reservoir had been drained there still would be residual oil present in the rock. This is a solution gas reservoir and the oil/gas contact should remain constant. That is, where there is a water drive mechanism there is a possibility that the oil would have been forced upward in the column causing oil to rise higher than the original gas/oil contact. The evidence in this case clearly indicates that the gas cap has expanded forcing the oil down. As the oil is forced down it leaves behind residue and staining which will clearly identify the original gas/oil contact. I therefore conclude that based on an oil/gas contact of minus 3,048 feet a net oil pay column of 82 feet is reasonable.

Mr. Lorenz found an average porosity of 19.16%. Mr. Cottrill found an average porosity of 13.13%. In large part the difference in porosity is attributable to the portion above the gas/oil contact at minus 3,048. The lost circulation zone was at 2,996 feet to 3,001 feet. Mr. Lorenz credited this interval with a fairly high porosity. The end product is that Mr. Lorenz's 19.16% porosity is unreliable

because it includes the porosity values for 48 net feet that are in the gas column and not in the oil column. Even if for speculative purposes one were to assume that there were 82 net feet of oil pay in the 6-3 and that the porosity was 19.16%, the porosity feet assigned to the 6-3 location would be 15.71. If this value were contoured in it would provide a new data point and would require new contouring. However, this data is not inconsistent with the oil porosity feet map presented in the original unitization hearing.

The foregoing discussion of the 6-3 well data is not offered for the purpose of suggesting that it should properly be included for a review of the data presented at the original hearing. It continues to be my opinion that use of the 6-3 data, at this late date, is inappropriate. The discussion is included as a result of the broad parameters of the remand order from the Circuit Court and to provide enlightenment on this lengthy portion of the testimony should the Court so desire.

The tract participation formula for the Columbus 3 unit credited porosity acre feet as 40% of the formula for the distribution of unit proceeds. Porosity acre feet is one method of giving each tract credit for the underlying reservoir. This method gives each tract credit for the volume available to contain reservoir fluids. There are other methods of crediting tracts with reservoir fluids.

The other methods calculate the oil in place multiplied by the expected recovery percentage and allocate the recoverable oil or gas estimate to each tract. A critical component in the determination of oil in place is to know the water saturation of the formation. That pore space occupied by water reduces the amount of oil available for production. Using differing water saturation levels in the reservoir will produce considerable disparity in the calculation of oil in place. For example, Mr. Lorenz assumed a water saturation of approximately 30% and calculated

there were 9 million barrels of oil in the Columbus 3 field. Sun Oil Company using a water saturation of approximately 15% calculated that the oil in place was in excess of 12 million barrels of oil. Sun explained that they chose to use porosity feet instead of oil in place because they believed the available water saturation data was not reliable. The porosity feet for each well was determined primarily from core data. These were washed cores, therefore, water saturation data was not reliable. Additionally, the early 1970's electric logs are not good indicators of water saturation. Sun did make oil in place calculations for the purpose of determining the feasibility of secondardy recovery operations and to estimate the incremental oil to be recovered by the project.

The contour map used in making calculations for the formula was the oil porosity feet map. This map gives a value to each well which represents the net thickness of pay times the average porosity which is then contoured. Additionally, a contour map of the Brown Niagaran, a contour map of the net pay thickness, and a contour map of porosity were prepared. Mr. Lorenz prepared one contour map in a different fashion. He took the maps of Sun Oil for oil porosity and net pay and superimposed one over the other. Wherever the isolines drawn on each map crossed, he interpreted the value. For example, where a 15% porosity isoline crossed a 120 foot net pay line he considered that to be a net oil porosity feet value of 18. This yielded additional data points which were placed on a base map with the well data and contoured, Plaintiff's Exhibit #4. As can be seen by Plaintiff's Exhibit #4, this yielded considerably more data points.

A review of tract 6 shows there are two wells present which gives two actual data points. By using Mr. Lorenz's technique an additional 30 data points are added. The drawing of contour maps is both an art and a science. The science is to recognize characteristics of the productive structure, to properly assign values to the wells and to

recognize trends from the data. The art is in the contouring between data points. There are generally accepted methodologies and techniques for contouring. Therefore it would be expected that competent geologists would produce similar maps. The emphasis is on the word "similar". The greater the number of data points, the greater the similarity that would be expected. The end products will not be identical. The record contains all the original contour maps plus a series of maps that include the data obtained from the 6-3 well.

The question to be addressed in this matter is whether the porosity acre feet calculations of Sun Oil assign a fair and equitable share of the oil and gas to each tract within the unit. It is the position of Plaintiff Koziara that if Sun's data is to be used, it is more accurately portrayed by their Exhibit 4 which is an oil porosity acre foot map. This map was derived entirely from Sun's data doing an overlay of the original oil porosity and oil thickness maps. In Exhibit 4 the values resulting from a crossing of isolines of the two contour points were entered on the map and then a contour map created using the additional points derived from the two maps. The argument is that this method gives a large number of data points thus increasing reliability of the map. As previously stated, this exercise yields 30 data points in tract 6 where previously there were only two represented by the well bores. There are a number of frailties with this approach. At first blush it appears attractive because it provides additional data points. In actuality these data points are not representative of data but rather the result of merger of two interpretations. In the recontouring these interpretative points are given equal credence with actual data. Because the interpretative points out number the real data points on tract 6 by 15 to 1 the resultant contour map gives much greater weight to interpretive data than to actual data. A review of Exhibit 4 shows that a substantial portion of tract 6 is given porosity feet values between 18 and 23. The highest actual

porosity feet measurement recorded in the field from well data was less than 16. There is no data to support the 18 to 23 values. It is true that Mr. Lorenz did, in his analysis of the 6-3 well, find a value for porosity acre feet in the range of 23 porosity feet. However, that data was not included on Exhibit 4 and further the 6-3 well was improperly credited with excessive oil pay as a result of an erroneous gas/oil contact.

After careful examination of the porosity foot calculations of the individual wells by Sun and Mr. Lorenz, absent 6-3 data, I conclude that there is minimal difference. The differences expressed are well within the range that one would expect from the interpretation of the same data by two different people. This is true in spite of the fact that the methodology employed by Sun and by Lorenz in determining porosity feet was somewhat different. Sun Oil Company used a porosity cut-off of 5%. That is any section of the well bore with less than 5% porosity was considered nonproductive and not included in net pay. Mr. Lorenz used a porosity cut-off of 3% in his calculations. Mr. Lorenz used logs and cores and whatever other data was available to make his interpretations. Sun Oil used a somewhat more standardized approach in their evaluations. Mr. Lorenz picked individual oil-water contacts; Sun Oil used a uniform oil-water contact throughout the field. Sun Oil relied primarily on core data to determine porosity. In the case of missing cores, Sun Oil averaged the known porosity above and below the missing section and used that value for the interval of missing core. Mr. Lorenz used logs to evaluate the missing interval. The methodology used by Mr. Lorenz is probably preferable and should yield somewhat greater accuracy. The Sun methodology was a methodology agreed upon by the operators in the field to provide for uniform treatment from well to well throughout the field. In spite of the different approaches the end results remain quite similar. I therefore find that the original porosity acre feet isopach, Exhibit 12 original record,

is a fair and equitable presentation of the value for oil of each tract when compared to the other tracts in the pool. There was no challenge to the gas porosity initially determined by Sun Oil represented by Exhibit 13. I find this is a fair and equitable representation of the gas reserves present under each tract when compared to other tracts throughout the field.

If the data for the 6-3 well were to be added to the oil porosity feet map, the difference would be negligible. Original record Exhibit 12 shows the location of the 6-3 well to be within the 13 oil porosity foot isoline. The measured value for the 6-3 well is 10.77 oil porosity feet. Therefore the data is within a range that would be expected from the original map. Sun contoured the oil porosity feet on Exhibit W using the 6-3 well data. The contouring between the 6-3 well and 6-2 well on this Exhibit is somewhat unusual. The contours indicate a lowering of porosity feet between the two points. There should not be 7 and 9 porosity feet isolines between these two points. The top of the reef should flow smoothly through tract 6 and not be interrupted. It is my opinion that original Exhibit 12 is the most accurate portrayal of reservoir conditions.

During the course of the proceeding the Plaintiff Koziara's witness pointed out that a planimetering error had been made on tracts 3, 6, and 9. Sun Oil reviewed their data and replanimetered the subject tracts and found that an error had been made. The results of the replanimetering are demonstrated on Sun Exhibits NN, 00, and PP. Exhibit PP shows the two [sic] participation factor that would be arrived at by replanimetering tract 6 only. The result is that the Koziara interest would go from .1674799 to .1738652. This is a difference of 0.0063853.

The Participation Formula

The Plaintiff Koziara maintains that the participation formula embodied in the unit agreement for the Columbus

3 field is unfair and inequitable and violate of his correlative rights. They maintain that the most fair and equitable formula would be one that is based entirely on oil in place. They were of the opinion that the Supervisor had never utilized a formula for unitization which contained production as a factor. This assertion is wrong. The Supervisor has used any number of factors in any number of different combinations. The Unitization Act puts no constraints on the parameters to be used in a unitization formula.

The Act requires that the Participation Formula fairly distribute the proceeds of production and that a requisite percentage of interest owners agree to the plan.

Participation formulas are arrived upon as a result of meetings of various operators in the field who form a technical committee. The first stage is for someone to perform a feasibility study. This feasibility study involves a review of the geological and engineering aspects of the reservoir to determine if it is a viable candidate for secondary recovery. Such a study was performed in this instance but was not offered in evidence. In this case the operators met to determine the Participation formula and to agree upon the technical approach to be taken towards assigning reservoir values to each well. For example, a constant oil-water contact was agreed upon. The Committee agreed to the treatment for lost cores. The porosity would be averaged above and below for those intervals where the core was missing. The Committee settled upon the porosity acre feet method for the reservoir portion of the formula. The initial maps were revised to reflect these agreements and a final map was prepared. The Participation Formulas for each tract were developed and included in the unitization plan and plan for unit operations. 97% of the operator's interest ratified the unitization plan.

Is there justification for weighting the formula 60% current production? The fact that 97% of the working interest

owners agreed to that component of the formula is an indicator that each felt they were getting their fair and equitable share. There are a number of reasons to be advanced as to why current production is appropriate. This portion of the opinion will not review the discussion of the fourth quarter production. However, this portion of the opinion is predicated upon the fourth quarter allowables being used in the Participation formula. Current production is reflective of current income and allows for a recognition and maintenance of current income levels for those who are involved in the field. Current production is a measure of well capability. Current production based upon allowables is a measure of the amount of oil and gas to be produced from a well without permitting waste.

An important component of correlative rights is the prevention of waste. Each operator is entitled to his fair share of the hydrocarbons in the reservoir provided he can recover that share without committing waste. The allowables determine the amount of oil that can be recovered without waste. Therefore, use of allowables is protective of correlative rights. The use of allowables reflects the relative well capability to recover primary production. The second component of formula 40% porosity acre feet gives credit for the reservoir volume underlying each tract. Neither component of the formula can be said to precisely measure the fair share of each and every tract. In this instance the allowables, because they are based on actual gas-oil ratio tests of each individual well, are a measure of the wells ability to recover its fair share of the reservoir products and energy. The porosity acre feet portion has been criticized because it does not give credit to actual volumes of oil and gas in place. This is because there is no reflection of the water saturation for each tract. Mr. Lorenz in Exhibit #1 went through each and every well and assigned, based on the electric logs and core, a water saturation to each tract. The end product was that he estimated there were around 9 million barrels of oil in

place. Since the actual recovery has been over 6 million barrels of oil, it is clear that an estimate of 9 million barrels in place is incorrect. Sun estimated there were 12 million barrels of oil in place. In both cases the same data was reviewed presumably using the same methodology. The disparity in the volumetrics can be attributed to differences in water saturation. Mr. Lorenz assumed a much greater water saturation than did Sun Oil. Therefore, Sun Oil determined that there was more oil in the reservoir than Mr. Lorenz.

The record is replete with challenges to data, challenges to the interpretations of data and challenges to the conclusions drawn from both. All of this gives the appearance that there is only one way to do things and only one answer that is correct. There are generally accepted methods to perform reservoir analyses. These analyses are generally dependent upon the quantity and quality of available data. The greater the amount of good quality data the more reliable the analyses become. In the case of the Columbus #3 field there were available both a good quantity and quality of data. Anyone making an analysis would always prefer to have more data, however, there was no shortage of data in this case. The reservoir was fairly well defined and developed. The field was developed on 40 acre units. The record clearly demonstrates that Sun reasonably construed the data and that they fairly and equitably determined the participation factors for all parties. I conclude that the participation formula provides for the distribution of the fair and equitable share of all interests within the unit.

Miscellaneous Matters

A number of other matters were in factual dispute at the hearing. All of the various contentions of error or allegations of concealment, fraud or misstatement have been considered. It is my opinion that there was no scheme to deprive Koziaras of their share. All Sun witnesses tes-

tified that they were unaware of any prior overproduction at the time of unitization. In fact, it appears they had very little knowledge or contact with day-to-day operations, most were out of state. There is no evidence that the Sun representatives approached the unitization in other than a professional manner. The substantial majority of the Koziara interests lies in tract 6. The working interest in this tract is owned by Sun. If the tract 6 interest was shortchanged, Sun would suffer a corresponding loss. To suggest that Sun consciously deprived Koziaras to benefit other tracts is not supported by the evidence or any reasonable inference to be drawn from it. There is nothing in the record that supports anything other than a professional difference of opinion.

I am compelled to comment on the plaintiff Koziara's "Technical Summary". In 20 years of practice I have never seen such a display of unrestrained rhetoric. The entire pleading is laced with misstatement, extra-record excursions, and hyperbole. All witnesses adverse to their interest are accused of lying, incompetence or both. This type of exercise does not provide assistance in reviewing the record, it just obscures it.

Those findings of fact proposed by the parties inconsistent with and not addressed by this Proposal for Decision, are rejected as being contrary to the evidence.

Conclusions of Law

The law governing the formation of units for unitized operations and governing this matter on remand is the "Michigan Unitization Law" MCL 319.351; MSA 13.139(101). The relevant language to this matter is contained in Section 6 which states in part

> "The order of the Supervisor shall be upon terms and conditions that are fair, reasonable and equitable, and shall prescribe a plan for unit operations that includes: (C) An allocation to the separately owned tracts in

> the unit area of all the oil and gas that is produced from the unit area and is saved, excepting that production which is used in the conduct of operations on the unit area or unavoidably lost. A separately owned tract's fair, reasonable and equitable share of production shall be measured by the value of each such tract for oil and gas purposes and its contributing value to the unit in relation to like values of all tracts in the unit."

There have been a number of cases that have interpreted the meaning of a fair and equitable share of production in the regulatory context. The Michigan Public Service Commission prorates gas reserves in a manner somewhat similar to unitization. The Commission allocates the total production of gas from a common reservoir among all of the wells within the reservoir. In a challenge to the regulatory authority of the Public Service Commission the Court of Appeals stated as follows:

> "Absent regulation, natural gas and oil are subject to the rule of capture under which, essentially, the first person to take them is entitled to them even though the well drains natural resources from under the land of another. See Williams & Meyers, Oil and Gas Law, pp 782-784. In most American jurisdictions, the rule has been modified by the 'fair share' or 'ownership-in-place' rule. Michigan is an ownership-in-place state. *Manufacturers Nat'l Bank* v *DNR*, 420 Mich 128, 141; 362 NW2d 572 (1984), Under the rule, 'each owner of the surface is entitled only to his equitable and ratable share of the recoverable oil and gas energy in the common pool in the proportion which the recoverable reserves underlying his land bears to the recoverable reserves in the pool.' *Wronski* v *Sun Oil Co.*, 89 Mich App 11, 22; 279 NW2d 564 (1979), quoting from 8 Nat Res Law 61, 64-65 (1975). 'Fair share'

> is implemented by a number of procedures, including balancing, retroactive adjusting and proration.
>
> Williams & Meyers, *supra*, pp 62, 756, 695-696. The proration which we are concerned about in this case is an allocation of the total production of gas from a common reservoir among the wells drilled into the reservoir." *N Mich Exploration Co.* v. *PSC* 153 Mich App 635, 638-639 (1986).

In the case of *Traverse Oil Company* v *Natural Resources Commission*. 153 Mich App 679(1986) an order of the Supervisor of Wells which allocated production on a surface acreage basis was challenged alleging that the Supervisor abused his discretion because he did not allocate upon the actual pool or reservoir underlying the property. The Court found that the Supervisor did not allocate production to barren lands and quoted the language used by the Supervisor in the order

> "I further conclude that the appropriate spacing and production unit is the SE1/4 NE1/4, Section 26. This unit provides for all parties to receive their fair and equitable share of the reservoir. Such spacing is necessary to encompass the maximum area to be economically and efficiently drained by one well. Although the precise parameters of the reservoir cannot be ascertained, it appears to substantially underlay the unit and sharing in the proceeds on the surface acreage basis is deemed fair and equitable."

A case with many parallels to the case at hand is *Gilmore* v *Oil and Gas Conservation Commission* 642 p 2d 773(1982). This is a Supreme Court of Wyoming opinion addressing an appeal from an Oil and Gas Conservation Commission order adopting a plan of unitization for an oil and gas field. The Commission had found that waste would occur by delaying secondary recovery and ordered a curtailment of production within the field pending unitization.

This curtailment motivated the various operators to attempt to agree on unitization for the field. The Court at page 775 states,

> "The operators held various meetings at which they voted on formula to be used in allocating production under unitization. The 81 working interest owners considered a total of 71 formulae.
>
> Naturally, each of the owners wanted parameters favorable to them and wanted more weight to be given these parameters. After voting on almost 60 formulae, the owners were frustrated in their attempt to find one that would receive the statutory approval. As a result, they examined their voting records and used a computer to arrive at an equitable compromise formula that could receive the required approval. The resulting formula #67 at issue here, received 75.89% approval. It appeared that no greater percentage would approve any formula proposed."

The Appellant objected to the unitization formula because he believed the production components of the formula were unfair to him and that the survey used shorted him by over 30 acres. A parties agreed e governmental survey used was inaccurate. The United States owned 62% of the royalty interest in the unit area and would only approve based on the old survey. This effectively gave veto power over the entire project to the United States.

The Gilmore case discusses the correlative rights of the appellant at pp 779,

> "he contends that in preventing waste his correlative rights cannot be ignored. We agree, but hold that substantial waste cannot be countenanced by a slavish devotion to correlative rights. We are faced with the delicate balancing problem between the prevention of waste and correlative rights, but prevention of waste is of primary importance.

> The right to produce one's fair share from the pool is limited by and subject to the practicalities of the situation and the ability to produce without waste. Other owners have a concomitant right to produce from the pool without waste." "In striking a balance between conservation of natural resources and protection of correlative rights the later is secondary and must yield to a reasonable exercise of the former."

The court later states, in conclusion, at page 781,

> "the group effort and compromise should not be discarded because of Appellant's general disagreement with the plan. Appellant seems to expect perfection. Justice was accomplished here, as much as could be under the circumstances. This litigation should end."

The cornerstone of governmental regulation of the oil and gas industry is the prevention of waste.

There is a strong public policy favoring the efficient production of oil and gas reserves so that the maximum recovery of oil and gas can be attained. The regulation of the common source of supply to prevent waste has long been recognized as a legitimate regulatory tool. In this instance the common source of supply has been regulated to allow for operations that maximize recovery. The success of this unit in substantially increasing the ultimate recovery of oil is a matter of record. The unitization plan does provide for a fair and equitable distribution of the benefits and burdens of unitization.

One of the allegations of the Plaintiff Koziara is that the Supervisor has never used a participation formula in a unitization similar to the one incorporated herein. It is his belief that unitization is to be based upon oil in place or pore volume of the reservoir. There is no set unitization formula. The statute does not require it and practical reality precludes it. The formula must be reflective of the data available and attain the agreement of the parties. Williams

& Myers, Oil and Gas Law, abridged edition page 670 states,

> "Perhaps the most frequently employed basis for allocating pooled unitized production is surface acreage. Another allocation method considers both acreage and other factors, e.g., saturated hydrocarbon pore space. Thus, the 50/50 allocation formula sustained by the Court in *Woody v State Corporation Commission* allocated 50% of the unit production on an acreage basis and 50% on the basis of saturated hydrocarbon pore space. Obviously such a formula may employ any percentage factor; in this case for example, some parties advocated a 70/30 formula and still others advocated a 90/10 formula, viz., giving more than 50% credit to saturated hydrocarbon pore space; one opinion was that in any unitization case the oil should be divided on the basis of 100% saturated by hydrocarbon pore space.
>
> When all of the premises included within a voluntary or compulsory unit have previously been developed, the parties may agree to an allocation of unit production on the basis of prior production."

The Supervisor has employed numerous participation factors including surface acreage, allowables, production history, oil and gas reserves and other factors. The unitization formula for the Columbus #3 field provides for a fair and equitable distribution of the benefits and burdens of unit operation.

The formula recognizes current productive capacity and potential future reserves. The initial responsibility for development of the participation formulae lies with those who own interests in the field. The task of the Supervisor is to determine if the statutory criteria have been satisfied. The only criteria to be addressed by this matter is the fairness and equity of the formula. I conclude as a matter of law that the formula treats all interests in a fair and

equitable manner. There is no question that the Koziara interests would prefer a formula that favored hydrocarbon pore space, such a formula was not agreed upon. Similarly, other owners might find other formulas to be to their benefit. The inquiry is not limited to what formula might best benefit a single tract. The inquiry must be directed towards the treatment of all tracts. All tracts were treated in the same manner and all tracts derived their fair, and equitable share.

Proposal

Based on the foregoing findings of Fact and Conclusions of Law it is proposed that the participation formula developed in this case be left undisturbed. Although a slight adjustment might be made to the participation factor by substituting field allowables for the fourth quarter production and because of a planimetering error, those changes are minor and well within any likely margin of error.

All interests joined the unit on the basis of the tract allocations and have shared proceeds by its application. The overproduction found by the St. Clair County Circuit Court did not influence the participation percentages allocated to the various tracts. The proceedings before the Supervisor in the original hearing resulted in a fair and equitable distribution of benefits and burdens of unit operation. The Order of the Supervisor should be affirmed.

5/25/86
Dated

William C. Fulkerson
William C. Fulkerson
Administrative Law Judge

AFFIDAVIT

STATE OF MICHIGAN)
) SS
U.S. DISTRICT COURT)

I, Dr. M. Y. Joshi, a Petroleum Engineer, first being duly sworn, deposes and states as follows:

1. I was asked to review all pertinent information relative to the Columbus "3" Field in St. Clair County, Michigan, and to determine whether the Dietrichs and the Koziaras received their "fair share" of the revenue received from the productin of oil and gas resources from tracts one, two and six.

2. That although Defendants are withholding critical data necessary to render a complete opinion, I reviewed all data either supplied at the Michigan Department of Natural Resources or made available by Defendants in other legal proceedings relative to this field.

3. It is clear from my study of the field that Plaintiffs were denied their "fair share" as is required by Michigan law as a result of intentional misconduct, errors in professional judgment, and a negligence on the part of Defendant and their employees.

4. That notwithstanding MCL 319.13 required the Defendants to abide by rules issued by the Supervisor of Wells during the effective period of Proration (February 1, 1971 through June 22, 1974), Defendants did not adhere to those rules although it is clear from the statute that such conduct is felonious.

5. That data supplied by Defendants show that the Supervisor's Rules 299.1503; 299.1504; 29.1506; 299.1507; and 299.1508 were consistently violated during that time period.

6. That as a result of these violations, valuable oil revenue was denied to Plaintiffs because oil was drained from the tracts that they had interest in.

7. That there is no way a royalty interest owner such as Plaintiffs or their predecessors could have known about Defendants misconduct because of the esoteric nature of the data that had to be reviewed before such a determination could be made.

8. That my opinion is based upon my knowledge and experience as a Petroleum Engineer for the last 20 years.

9. That Defendants withheld this information from the State of Michigan, the Plaintiffs and other royalty interest holders of the Columbus "3" Field.

10. That notwithstanding that Defendants knew or had to know that the Production Figures for the Pforation period had nothing to do with the wells ability to produce oil, Defendants, in petitioning for a Unitization of the field, used a 60/40 formula for determining the participation percentages for the royalty interest holders.

11. This 60 percent assigned to production overcredited tracts where Defendants were overproducing one well and attributing that production to other wells in violation of the Supervisor of Wells Proration Order.

12. The net effect of this misconduct was to substantially underrepresent the participation percentage that was assigned to the Plaintiffs and to overcredit tracts where there was less of an oil reserve and less of a royalty that had to be paid by Defendants.

13. That there are substantial problems with the "professional" interpretation by Defendants of the geology of the Columbus "3" Field. Errors, incorrect interpretations, and intentional misconduct can be seen.

14. That there is no way that Plaintiffs could have known of Defendants misconduct by a review of the data that Defendants sent to Plaintiffs and/or the letter that sought agreement to the Unitization of the field that stated that scientific study had been made of the field by

Defendants and that royalty interest owners would receive their fair share. Defendants clearly misrepresented the facts to the Dietrichs predecessors to obtain their agreement to the Unitization. The Dietrichs were and are being substantially denied their fair share of revenue from the field as is required by law.

15. That it is my professional opinion that Defendants conduct can in no way be stated to at a level of a "prudent operator."

16. That Plaintiffs' participation percentage, had Defendants properly represented them, would be far in excess of the approximately 17% they are credited with at present.

17. It is clear that Defendant's conduct was goal oriented, i.e. that is to obtain the Unitization of the Columbus "3" Field and that without the "discrepancies" that I found, Defendants could not have unitized the field or obtained as great a return on their investment in the wells in the southern region of the field.

18. The net effect on Defendant's conduct was to financially harm the Plaintiffs in this matter.

FURTHER, Deponeth sayeth not.

M. Y. Joshi

Dated: March 25, 1988

Subscribed and sworn to before me
this 25th day of March, 1988.

Susan L. Clark

Notary Public, Wayne County, Michigan
My Commission Expires: February 14, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 87-CV-70451-DT
HONORABLE PAUL V. GADOLA

EDGAR J. DIETRICH and THERESITA DIETRICH,
Plaintiffs,

VS.

SUN EXPLORATION AND PRODUCTION COMPANY, a Delaware Corporation, and SUN OPERATING LIMITED PARTNERSHIP, a Delaware Limited Partnership,
Defendants.

JACK C. CHILINGIRIAN (P 11838)
Attorney for Plaintiffs
24055 Jefferson Ave., Ste. 200
St. Clair Shores, MI 48080
(313) 777-0400

LYNAM & ASSOCIATES
BY:TERENCE V. LYNAM (P 26490)
SUSAN LESNEK (P 38447)
Attorneys for Defendants
P.O. Box 80705
Lansing, MI 48908
(517) 321-4545

MOTION IN LIMINE TO CLARIFY AND/OR AMEND FINAL PRETRIAL ORDER

Plaintiffs through their attorney, JACK C. CHILINGIRIAN, request that this court clarify and/or amend its Final

Pretrial order dated June 8, 1992, and in support states as follows:

1. Page 2, paragraph 2 of the Final summarizes a portion of the Plaintiffs' claims as follows:

> "Plaintiffs allege that in November of 1984 through March of 1985, Defendant, Sun Oil Company's records showed that an additional 881,071 barrels of oil were produced in the Columbus III field between November, 1984 and March, 1985 for which Plaintiffs were not compensated. Plaintiffs further allege that "said figures were subsequently removed from the production records after an inquiry was made by Eugene Koziara." (Amended Complaint, Paragraphs 45 and 45; Plaintiffs' Claims, submitted October 30, 1990)."

2. Defendants now claim that the Plaintiffs have committed themselves to prove facts at trial which would show that the 881,071 barrels of oil were actually *produced* during November, 1984 and March, 1985.

3. Defendants are splitting hairs and attempting to have this court read the above referenced portion of the Final Pretrial Order in a hyper-literal way.

4. Plaintiffs have always claimed that the Defendant's records during the time period between November, 1984 and March, 1985, showed the additional 881,071 barrels of oil produced. This does not mean that the barrels of oil were actually produced during that time period. Evidence may or may not be elicited at trial to show exactly when the barrels of oil were produced.

5. It was not the intent of the Plaintiffs to allege and claim that the 881,071 barrels of oil were actually produced during the time period between November, 1984 and March, 1985. Plaintiffs claim is and always has been that

the records during that time period show the production during those time periods.

WHEREFORE, the Plaintiffs request that this court enter an order amending the Final Pretrial Order to properly reflect the Plaintiff's claims or enter such other order as may be appropriate to allow the Plaintiffs to claim that the 881,071 barrels of oil may have been actually produced during time periods outside the November, 1984 through March, 1985 time period.

Respectfully submitted,

JACK C. CHILINGIRIAN (P 11838)
Attorney for Plaintiffs
24055 Jefferson Ave., Ste. 200
St. Clair Shores, MI 48080
(313) 777-0400

DATED: July 1, 1992

BRIEF IN SUPPORT OF MOTION IN LIMINE TO CLARIFY AND/OR AMEND FINAL PRETRIAL ORDER

FRCP 16 (e) provides that the Final Pretrial Order shall control the subsequent course of the action unless modified by a subsequent order. The Rule goes on to state "the order following a final pretrial conference shall be modified only to prevent manifest injustice".

Courts have been willing to amend the Final Pretrial Order or clarify it when justice requires. Rule 16 was not intended to be a trap for unwary counsel and their litigants. *Peter Eckrich and Sons Inc.* v *Selected Meat Co.*, 512 F2d 1158 (1975, CA7 Ill.). Here, Defendants wish to trap the Plaintiffs by preventing them from arguing that the barrels of oil may have been produced at different times but that the records showing their production exist from November, 1984 through March, 1985.

In *Insurance Co. of North America* v *Northwestern Nat. Ins. Co.*, 494 F2d 1192 (1974, CA6 Mich.), the trial court

allowed additional proof to explain a stipulation that was entered into as part of the pretrial order. The Court of Appeals held that the trial court did not err in allowing additional proof which it considered essential to adjudicating the controversy, since the facts as contained in the stipulation were largely bare-bones, and additional proof did not contradict agreed facts, but added flesh and life to them and presented an understandable controversy to which the judge could apply the law and the facts.

In the instant case, the stipulation is a brief explanation of the Plaintiff's claims. Plaintiffs had no intention of being barred from introducing further evidence to explain their claims. Plaintiffs had no intention of claiming that the 881,071 barrels of oil were all actually *produced* during the time period reflected in Sun Oil's records. Plaintiff has always intended to allow the jury to determine when the barrels were actually produced based on the evidence to be presented at trial.

WHEREFORE, the Plaintiffs request that this court enter an order amending the Final Pretrial Order to properly reflect the Plaintiff's claims or enter such other order as may be appropriate to allow the Plaintiffs to claim that the 881,071 barrels of oil may have been actually produced during time periods outside the November, 1984 through March, 1985 time period.

Respectfully submitted,

JACK C. CHILINGIRIAN (P 11838)
Attorney for Plaintiffs
24055 Jefferson Ave., Ste. 200
St. Clair Shores, MI 48080
(313) 777-0400

DATED: July 1, 1992

State of Michigan
Department of Natural Resources
Supervisor of Wells

CAUSE NO. (A) 1-5-73

IN THE MATTER OF THE PETITION OF SUN OIL COMPANY FOR UNITIZATION OF THE COLUMBUS SECTION "3" SALINA-NIAGARAN FORMATION POOL, ST. CLAIR COUNTY, MICHIGAN FOR THE PURPOSE OF CONDUCTING SECONDARY RECOVERY OPERATIONS BY PRESSURE MAINTENANCE

REPORT OF THE SUPERVISOR OF WELLS

On March 20, 1973 Sun Oil Company of Tulsa, Oklahoma, pursuant to the provisions of Act No. 197 of the Public Acts of the State of Michigan, 1959, filed a petition with the Supervisor of Wells for an Order providing for the unitized management, operation and pressure maintenance of the Salina-Niagaran Formation, common source of supply in a specified area designated as the Columbus Three Unit located In St. Clair County, Michigan.

After due notice as provided in Act No. 197 of the Public Acts of the State of Michigan, 1959 and in compliance with the Rules of Procedure in Public Hearings before the Supervisor of Wells, a public hearing was held on said Petition on May 15, 1973 in the City of Lansing, Michigan. At said hearing before the Supervisor of Wells the petitioner submitted proof, exhibits, evidence and testimony relating to a plan of unitized management, operation and pressure maintenance which the Petitioner recommended be approved by the Supervisor of Wells. Other interested parties were afforded an opportunity to be heard In connection therewith.

FINDINGS OF FACT

Pursuant to review and consideration, the Supervisor of Wells finds:

1) That the unitized management and operation of the Columbus Three Unit in St. Clair County as described in said Petition is reasonably necessary to substantially increase the ultimate recovery of oil and gas therefrom;

2) That the type of operation contemplated by the Unit Agreement and Unit Operating Agreement is feasible, will prevent waste, and will protect correlative rights;

3) That the estimated additional costs of conducting such operations will not exceed the value of the additional oil and gas recovered;

4) That the Petitioner submitted a Unit Agreement and Unit Operating Agreement which constitute a plan of Unit operation. The evidence shows that such plan has been approved in writing by those persons to be required to pay at least 75% of the costs of the Unit operation (as required in Section 7, P.A. 197) but has not been approved by the required 75% of the owners of record of interests that are free of costs.

CONCLUSIONS

That Act No. 197 of the Public Acts of the State of Michigan, 1959, applies to the Petition of Sun Oil Company and these proceedings before the Supervisor of Wells;

That the Supervisor of Wells has jurisdiction of the subject matter and the persons interested therein; that due and proper notices of the petition and of the time, place, and purpose of the hearing was given as required by law;

that all interested parties were afforded an opportunity to be heard therein; and

That in the interest of obtaining the benefits of unit operation, the prevention of waste, and the protection of correlative rights, this petition should be granted. However, the petitioner has not obtained approval in writing from those persons who are owners of record of at least 75% of the production or proceeds thereof that are credited to interests which are free of cost such as but not limited to royalties; overriding royalties and production payments as provided in Section 7 of Act No. 197 of the Public Acts, State of Michigan, 1959.

DETERMINATION OF THE SUPERVISOR OF WELLS

The plan for Unit operation, as set forth in a Unit Agreement and a Unit Operating Agreement, both submitted into evidence, is found to be appropriate for carrying on Unit operation and for the protection and adjustment of correlative rights and is found to contain each of the other requirements necessary for the issuance of an order as provided in Section 6, Public Acts, State of Michigan, 1959. This being the case, the plan for Unit operation is approved subject to the provision below.

That upon the Petitioner, Sun Oil Company, obtaining and filing written approval of the Unit Agreement and Unit Operating Agreement from at least 75% of the Interests which are free of cost the Supervisor will hold a supplemental hearing as provided in Section 8 of Act No. 197, Public Acts, State of Michigan, 1959. Pursuant thereto, if written approval is found within the prescribed time, the Supervisor shall issue his order for unitization declaring the plan effective, as petitioned, setting forth the terms and conditions and the date for commencement of unit operation.

Signed and ordered published this twentieth day of June, 1973.

ARTHUR E. SLAUGHTER
SUPERVISOR OF WELLS

STATE OF MICHIGAN
DEPARTMENT OF NATURAL RESOURCES
SUPERVISOR OF WELLS

ORDER NO. (A) 1-74

IN THE MATTER OF THE PETITION OF SUN OIL COMPANY (DELAWARE) FOR UNITIZATION OF THE COLUMBUS SECTION "3" SALINA-NIAGARAN FORMATION POOL, ST. CLAIR COUNTY, MICHIGAN, FOR THE PURPOSE OF CONDUCTING SECONDARY RECOVERY OPERATIONS BY PRESSURE MAINTENANCE

REPORT OF THE SUPERVISOR OF WELLS

On March 20, 1973, Sun Oil Company (Delaware) of Tulsa, Oklahoma, pursuant to provisions of Act No. 197 of the Public Acts of the State of Michigan, 1959, filed a petition with the Supervisor of Wells for an Order providing for the unitized management, operation and pressure maintenance of the Salina-Niagaran Formation, common source of supply in a specified area designated as the Columbus Three Unit located in St. Clair County, Michigan.

After due notice as provided in Act No. 197 of the Public Acts of the State of Michigan, 1959, and in compliance with the Rules of Procedure in Public Hearings before the Supervisor of Wells, a public hearing was held on May 15, 1973, in the City of Lansing, Michigan. At said hearing before the Supervisor of Wells the Petitioner submitted proof, exhibits, evidence and testimony relating to a plan of unitized management, operation and pressure maintenance which the Petitioner recommended be approved by the Supervisor of Wells. Other interested parties

were afforded an opportunity to be heard in connection therewith.

The determination of the Supervisor of Wells issued in this matter on the 20th day of June, 1973, approved the plan for unit operation subject to the Petitioner, Sun Oil Company, obtaining and filing written approval of the Unit Agreement and Unit Operating Agreement from at least 75% of the interests which are free of cost and the Supervisor holding a supplemental hearing as provided in Section 8 of Act No. 197, Public Acts, State of Michigan, 1959.

On May 3, 1974, Sun Oil Company (Delaware) of Tulsa, Oklahoma, pursuant to provisions of Act No. 197 of the Public Acts of the State of Michigan, 1959, filed Petition with the Supervisor of Wells for a final order providing for the unitized management, operation and pressure maintenance of the Salina-Niagaran Formation, common source of supply in a specified area designated as the Columbus Three Unit located in St. Clair County, Michigan.

After due notice as provided in Act No. 197 of the Public Acts of the State of Michigan, 1959, and in compliance with the Rules of Procedure in Public Hearings before the Supervisor of Wells, a supplemental public hearing was held on June 25, 1974, in the City of Lansing, Michigan. At said hearing before the Supervisor of Wells the Petitioner submitted proof, exhibits, evidence and testimony that the Unit Agreement and Unit Operating Agreement which constitute a plan of unit operation, have been approved in writing by those persons required to pay at least 75% of the costs of unit operation and by the owners of record of at least 75% of the interests that are free of costs; the Petitioner recommended final approval of the plan of unitization and pressure maintenance for secondary recovery purposes by the Supervisor of Wells; and Petitioner asked that the plan of unitization become effective at 7:00 A.M., June 30, 1974. Other interested

parties were afforded an opportunity to be heard in connection therewith.

FINDINGS OF FACT

1) That the unitized management and operation of the Columbus Three Unit in St. Clair County as described in said Petition is reasonably necessary to substantially increase the ultimate recovery of oil and gas therefrom;

2) That the type of operation contemplated by the Unit Agreement and Unit Operating Agreement is feasible, will prevent waste, and will protect correlative rights;

3) That the estimated additional costs of conducting such operations will not exceed the value of the additional oil and gas recovered;

4) That the Petitioner submitted a Unit Agreement and Unit Operating Agreement which constitute a plan of Unit Operation. The evidence shows that such plan has been approved in writing by those persons to be required to pay 97.75476% of the costs of the Unit operation and has also been approved by the owners of record of 76.65132% of the interests that are free of costs.

CONCLUSIONS

That Act No. 197 of the Public Acts of 1959 and Act No. 61 of the Public Acts of 1939, as amended, applies to the Petition of Sun Oil Company (Delaware) and these proceedings before the Supervisor of Wells.

That the Supervisor of Wells has jurisdiction of the subject matter and the persons interested therein; that due and proper notices of the Petition and of the time, place, and purpose of the hearing was given as required by law;

that all interested parties were afforded an opportunity to be heard therein; and

That in the interest of obtaining the benefits of unit operation, the prevention of waste, and the protection of correlative rights, this petition should be granted.

ORDER OF THE SUPERVISOR OF WELLS

It is therefore ordered by the Supervisor of Wells as follows:

1) That the Petition of Sun Oil Company (Delaware) as Unit Operator be granted and that the Columbus Three Unit is hereby created in accordance with and subject to the terms, provisions, and conditions of the Unit Agreement and Unit Operating Agreement as filed in these proceedings.

2) That the Columbus Three Unit Area shall be the area outlined on the Map, "Exhibit "A", attached to the Unit Agreement and that the Unit Agreement and Unit Operating Agreement are made a part of this order by reference with the same force and effect as if set out herein in their entirety.

3) That each of the tracts within the Unit Area, as shown on Exhibit "A", attached to the Unit Agreement, subject to the terms and provisions of the Unit Agreement and Unit Operating Agreement, shall participate in the unit production and in other benefits and burdens of the Unit in accordance with the specified tract participation.

4) That those persons owning working interests not signing the Unit Agreement and Unit Operating Agreement shall be carried by the Unit Operator and shall be charged reasonable interest in the amount of seven per cent (7%) per annum for all operating costs and costs of development advanced as provided for in the Unit Agreement and Unit Operating Agreement, payable solely out of such person's share of unit production.

5) That the Columbus Three Unit be operated exclusive of and as an exception to the Proration Order and Spacing Order for the Columbus Section "3" Salina-Niagaran Formation Pool.

6) That the pressure maintenance program be initiated for improved recovery permitting the use and injection of water and produced brine and gas into the Niagaran Brown Dolomite Formation producing zone.

7) That the Unit Operator, Sun Oil Company (Delaware), shall from time to time make such reports to the Supervisor of Wells concerning the operation of the unit as may be requested.

8) That the Unit Agreement and Unit Operating Agreement are hereby made effective and that unit operations under these agreements shall be commenced on June 30, 1974, at 7:00 A.M.

The Supervisor of Wells retains continuing jurisdiction over the Columbus Three Unit in order that he may exercise such administrative control as is consistent with his powers and duties as established by the statutes of the State of Michigan.

Signed and ordered published this 25th day of June, 1974.

A. GENE GAZLAY
SUPERVISOR OF WELLS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 87-CV-70451-DT
HONORABLE PAUL V. GADOLA

EDGAR J. DIETRICH and THERESITA DIETRICH,
Plaintiffs,

v.

SUN EXPLORATION and PRODUCTION COMPANY and
SUN OPERATING LIMITED PARTNERSHIP,
Defendants

JACK C. CHILINGIRIAN (P 11838)
Attorney for Plaintiffs
24055 Jefferson Ave., Ste. 200
St. Clair Shores, MI 48080
(313) 777-0400

LYNAM & ASSOCIATES
BY: TERENCE V. LYNAM (P 26490)
Attorneys for Defendants
P.O. Box 80705
Lansing, MI 48908
(517) 321-4545

MOTION FOR FRCP 11 SANCTIONS

NOW COME DEFENDANTS by their counsel and move this Court for an Order granting them sanctions against Plaintiffs saying:

1. On July 8,1992 this Court entered an Order which dismissed Count V, the last remaining count in this action,

based upon Plaintiffs' admission, on the morning of the commencement of trial, that Plaintiffs were unable to present proofs essential to their case. This Order provided that Defendants be entitled to costs.

2. Defendants interpret this to include, at this point, statutory costs only, which would not require payment of actual out- of-pocket expenses, including reasonable attorneys fees, incurred by Defendants as a result of Plaintiffs' untimely admission regarding the status of their proofs (or lack thereof).

3. Defendants aver that the record of this case calls for the imposition of sanctions under FRCP 11, and Defendants so move this Court.

4. From Defendant's perspective, it is impossible to form an opinion as to the sharing of the responsibility between Plaintiff and counsel for the events and consequences which led ultimately to the inordinately expensive dismissal of Count V. However, Defendants contend that Plaintiff Edgar Dietrich's background is of such a nature as to place responsibility upon him unusual to a party vis-a-vis his counsel.

5. Plaintiff Edgar Dietrich is an attorney who has been engaged in the practice of law since 1959 (Dietrich Dep. Trans., Page 5) and at the time of filing of this action was the directing and possibly only shareholder of Dietrich and Cassavaugh P.C., the then attorneys of record for Plaintiffs. Defendants believe that Edgar Dietrich was fully aware of the effects of actions taken by counsel on his behalf and that he ordered all such actions for the purposes of harassment of Defendants, delay, and the increase of Defendants litigation costs.

6. As this Court is well aware, after the February 10, 1992 dismissal of Counts I, III, and IV Defendants urged Plaintiffs to voluntarily dismiss Count V. Indeed, Plaintiffs tried to bargain for such dismissal contingent upon this

Court's waiver of substantial sanctions previously imposed. When Defendants would not agree to allow Plaintiffs to avoid the consequences of their prior inappropriate behavior, Plaintiffs, with full knowledge of the status of their proofs, undertook to pursue a course of harassment.

7. In its Order Accepting the Report and Recommendation of the Magistrate, this Court implicitly gave Plaintiff the benefit of the doubt as expressed by the Magistrate. As recognized by the Court in its most recent opinion and Order, Plaintiff responded by causing the Court to take up its, a jury's and Defendants' time and expense, including transportation of witnesses and counsel from Dallas, Texas for trial, only to admit that proofs did not exist necessary to a trial on the merits.

8. Defendants represent to this Court that they expended in excess of $14,000.00 for reasonable attorneys fees and in excess of $6,000.00 for expenses since the February 10, 1992 Order. It is Defendants' contention that none of these expenses would have been incurred but for Plaintiff Edgar Dietrich's sanctionable conduct.

9. Defendants request that the Court review the record of this case and impose its powers under Rule 11 to assure that this sort of conduct will not occur in the future. The requirement that Plaintiff reimburse Defendants for actual costs and attorneys fees is appropriate to the purposes of the provisions of Rule 11, both from an equity and deterrent perspective. Defendants believe that Plaintiff Edgar Dietrich is a person of substantial wealth and well able to comply with such a requirement. Indeed, experience has shown that prior "substantial sanctions" (in the words of the Magistrate) were of no deterrent effect.

10. It is not Defendants' intention to prolong an already unreasonably protracted litigation and Defendants are mindful of this Court's busy docket, however, unless this Court punishes conduct of the sort evidenced by the record

and this Court's prior findings, there can be no substance to Rule 11 nor can its purposes be realized.

11. Counsel for movants has sought concurrence in the matters contained herein from counsel for Plaintiffs. Plaintiffs will not stipulate to such an Order.

WHEREFORE, DEFENDANTS request that this Court review the record of these proceedings in light of this Motion and accompanying Brief and impose appropriate sanctions under the provisions of FRCP 11, including but not limited to reimbursement of Defendants' actual costs and attorneys fees in the amount of $20,000.00.

Respectfully submitted,

/s/ Terence V. Lynam
Terence V. Lynam (P26490)
Attorney for DEFENDANTS

Dated: August 6, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 87-CV-70451-DT
HONORABLE PAUL V. GADOLA

EDGAR J. DIETRICH and THERESITA DIETRICH,
Plaintiffs,
SUN EXPLORATION and PRODUCTION COMPANY and
SUN OPERATING LIMITED PARTNERSHIP,
Defendants

JACK C. CHILINGIRIAN (P 11838)
Attorney for Plaintiffs
24055 Jefferson Ave., Ste. 200
St. Clair Shores, MI 48080
(313) 777-0400

LYNAM & ASSOCIATES
BY: TERENCE V. LYNAM (P 26490)
Attorneys for Defendants
P.O. Box 80705
Lansing, MI 48908
(517) 321-4545

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SANCTIONS

It hardly seems necessary to brief the decisions and treatises relating to the application of FRCP 11 to the facts contained within the record of this cause. One need look no further than this Court's Opinions and Orders to find the necessary predicate for the imposition of the sanctions sought by this motion.

As noted in the Court's most recent Opinion, Plaintiffs' conduct is reprehensible and inexcusable. The effect of Plaintiffs' actions was obviously predictable. Plaintiffs succeeded in harassing Defendants, making them prepare to defend a claim which Plaintiffs knew they were unable to prove. Plaintiffs succeeded in delaying Defendants' rightful removal of the cloud created by unfounded allegations of wrongdoing which went to the very heart of Defendants business reputation. It wasn't enough that it had taken five years to gain dismissal of Plaintiffs other legally insufficient and spurious claims; Plaintiffs had to delay the final act six more months.

Plaintiffs also succeeded in enlarging Defendants' litigation costs. As a result of Plaintiffs' actions Defendants were required to:

A) Incur legal expenses:

1) to participate in the preparation of a Final Pretrial Order which included a meeting in Plaintiffs' counsel's office.

2) to attend a status conference with the Court.

3) to respond to motions.

4) to take the deposition of Ray Ellison

5) to prepare for trial.

6) to participate in the selection of a jury.

7) to appear for trial.

B) Incur other expenses:

1) to transport two witnesses and in-house legal counsel to Detroit from Dallas, Texas.

2) to accommodate them for four days.

3) to cause these employees of Defendants to put aside productive work in order to participate in activities which were a total waste of time.

It is worthy of note that the expense figures mentioned below do not reflect the costs associated with item (B)(3) above. As all these individuals are employees, the calculation of the value of their "lost time" would require even more lost time for others. Defendants believe that the fact of such loss is relevant, although reimbursement for it is not specifically sought.

Defendants' counsel is an attorney with more than fifteen years of experience with emphasis on oil and gas law. He has published articles in the publication of the Real Property Section of the Michigan Bar Association and the Eastern Mineral Law Foundation. He has been a speaker at seminars sponsored by the Michigan Bar and the Institute of Continuing Legal Education of the University of Michigan. Counsel for Defendants was retained on an hourly basis at the rate of $135 per hour. One hundred four (104) hours were expended between February 12, 1992 and the present.

Additional costs, including the cost of the deposition transcript of Ray Ellison, totaled $831.85.

Defendants costs of transportation and accommodation of witnesses and company counsel came to $5,236.98.

With regard to the deposition of Ray Ellison, Defendants contend that expenses associated with its taking are properly assessable to Plaintiffs because the deposition was taken at the request of Plaintiffs to provide testimony from an independent source which would substantiate Defendants' assertions that a clerical error had occurred. This Mr. Ellison did, but Plaintiffs chose to ignore it.

The subject of sanctions under FRCP 11 as amended is thoroughly discussed with considerable supporting citations, by the Honorable William Schwarzer in 104 FRD 181 (1985). Rather than citing the substantial authorities of which this Court must already be aware, Defendants

refer to this comprehensive article which has served as an authoritative discussion of Rule 11 sanctions.

Proceedings for the imposition of sanctions may be initiated on motion of a party. The Court has the discretion to tailor sanctions to the particular facts of the case. The Court should consider the impact of the violation. The most direct consequence is reflected in the attorney's fees and other expenses inflicted on the other side.

The rule reflects the dual purposes of compensating the offended party and penalizing the offender to achieve special and general deterrence. In this case Plaintiffs were found to have been subject to sanctions under the provisions of other rules. As noted, it would appear that the Court gave Plaintiffs the benefit of any doubt as to their motivations. Plaintiffs responded by engaging in even more obviously reprehensible conduct. While under Rule 11 it is not necessary that the court find bad faith on the part of the offending party, here Plaintiffs have, by their actions, erased any doubt as to their intentions or, in Defendants' view, any question regarding the existence of bad faith.

It is distasteful to Defendants, having achieved full dismissal after five and one half years, to have to bring this motion, but as stated by Judge Schwarzer at page 205 of the above referenced article, "[o]f all the duties of a judge, imposing sanctions. . . is the most unpleasant. But if judges turn from Rule 11 and let it fall into disuse, the message to those inclined to abuse or misuse the litigation process will be clear. Misconduct, once tolerated, will breed more misconduct. . ."

In this case the Plaintiffs obviously didn't get the message. Defendants entreat the Court to send a louder one and grant them reimbursement of their actual reasonable attorneys fees and expenses so wrongfully incurred.

Respectfully submitted,

/s/ Terence V. Lynam
Terence V. Lynam (P26490)
Attorney for DEFENDANTS

Dated: August 6, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 87-CV-70451-DT
HONORABLE PAUL V. GADOLA

EDGAR J. DIETRICH and THERESITA DIETRICH,
Plaintiffs,

VS.

SUN EXPLORATION AND PRODUCTION COMPANY, a Delaware Corporation, and SUN OPERATING LIMITED PARTNERSHIP, a Delaware Limited Partnership,
Defendants.

JACK C. CHILINGIRIAN (P 11838)
Attorney for Plaintiffs
24055 Jefferson Ave., Ste. 200
St. Clair Shores, MI 48080
(313) 777-0400

LYNAM & ASSOCIATES
BY: TERENCE V. LYNAM (P 26490)
SUSAN LESNEK (P 38447)
Attorneys for Defendants
P.O. Box 80705
Lansing, MI 48908
(517) 321-4545

ANSWER TO MOTION FOR FRCP 11 SANCTIONS

NOW COMES the above named Plaintiffs, EDGAR J. DIETRICH and THERESITA DIETRICH, by and through their attorney, JACK C. CHILINGIRIAN, and in answer to the

Motion for FRCP 11 Sanctions filed by the Defendants states as follows:

1. In answer to paragraph 1, Plaintiffs would indicate that the record of July 2, 1992 will clearly delineate the events that took place on the first day of trial in this matter. In further answer to paragraph 1, Plaintiffs would indicate that although there was an acknowledgment as to the Complaint and the manner and form of the contents of said Complaint relating to Count V, as to the content and the form of the Final Pre-Trial Order there is no suggestion that the requested amendment was inappropriate and that the Court lacked the power to allow such amendment thereby precluding the litigation from proceeding to its final conclusion before the Court and Jury. The Plaintiffs had preserved the right to amend their Complaint in the Final Pre-Trial Order. This alone precludes any entitlement to sanctions.

2. In answer to paragraph 2, Plaintiffs interpret the Order of the Court as not permitting out of pocket expenses, including reasonable attorney fees regardless of the admission by Plaintiffs and Plaintiffs' counsel relative to the status of proofs on the first day of trial. In further answer to paragraph 2, the Court needs to analyze the record completely to ascertain the position taken by Plaintiffs at the time of trial prior to any determination of Rule 11 Sanctions.

3. In answer to paragraph 3, Plaintiffs deny that the record of this case calls for the imposition of sanctions under FRCP 11 and further, would indicate to this Court that there is no jurisdiction with respect to such sanctions and the only authority of this Court based upon the rules is to tax costs and attorney fees which are permitted pursuant to statute and Court Rule.

4. In answer to paragraph 4, Plaintiffs deny that any responsibility should be placed upon Mr. Dietrich regardless of his status as an attorney. Further, Plaintiffs' counsel

acted properly throughout these proceedings and cannot be charged with any Rule 11 Sanctions.

5. In answer to paragraph 5, Defendants cannot rely upon what they believe Mr. Dietrich's intentions were since they would be speculating. Also, Plaintiffs and their counsel are fully protected by the attorney/client privilege as to what Mr. Dietrich ordered his attorney to do in this litigation. Plaintiffs' counsel moved promptly on behalf of his clients and in no way intended to harass the Defendants or delay the cause of action or increase the Defendants litigation costs.

6. In answer to paragraph 6, Plaintiffs would indicate to this Court that the effort at resolution by Plaintiffs to settle which was previously rejected by the Court and rejected by the Defendants cannot form the basis for any allegations of inappropriate behavior on behalf of the Plaintiffs or their counsel. In further answer to paragraph 6, Defendants were well aware of the status of the proofs in this case and at no time did they assert that the Plaintiffs were pursuing a course of harassment. Further, this Court's denial of a Motion for Summary Judgment on Count V was based upon records which clearly established production of oil not paid for. A dismissal solely on the basis of a technical defect in the pleadings or in the Final Pre-Trial Order is not equitable under the circumstances.

7. In answer to paragraph 7, the issue of the Report and Recommendation of the Magistrate cannot be raised at this point since the Plaintiff has in fact remitted those sums previously determined to be due and owing to the Defendants. This Court cannot in any way allow the Defendants to assert that Order as a reference to form the basis for any sanctions pertaining to the present motion based on events that took place at trial. In effect, it would be punishing the Plaintiffs twice and that certainly would not be equitable.

8. In answer to paragraph 8, Plaintiffs are without sufficient basis to form any belief as to the propriety of those costs that have been alleged in that paragraph. In further answer to paragraph 8, it is the position of the Plaintiffs that the Court took a restrictive view of the pleadings as well as the Final Pre-Trial Order in granting the Judgment of Dismissal on the first day of trial. Thus, the actions of Plaintiffs again cannot form the basis for any sanctionable conduct authorizing this Court to assess costs and attorney fees in the magnitude asserted by the Defendants in paragraph 8.

9. In answer to paragraph 9, Plaintiffs would indicate that several counts have been previously dismissed on Summary Judgment, all of which were of a substantial nature and all of which are now presently on appeal. With respect to Count V, it was Plaintiffs position at all times that the allegations in Count V also related to Counts I, III and IV, and provided the Plaintiffs sufficient proofs to substantiate their cause of action. The Court's granting Summary Judgment relating to Counts I, III and IV undermind the allegations in Count V. In further answer to paragraph 9, substantial sanctions are not to be utilized as a deterrent effect, but only when in fact there is a frivolous claim, all of which have not been substantiated by the Defendants throughout the entirety of these proceedings.

10. In answer to paragraph 10, Plaintiffs believe that the Defendants are seeking these Rule 11 Sanctions for the sole purpose of deterring the appeal in this matter and further, Rule 11 Sanctions can only be imposed when the Court finds and determines that there was no basis whatsoever in fact or law a cause of action or a Count in such cause of action. In the instant action, it is clear from the pleadings that were filed and from the prior denial of Summary Judgment by Judge Duggan, that the cause of action submitted by the Plaintiffs was based upon fact and law.

11. In answer to paragraph 11, Plaintiffs acknowledge that they would not stipulate to the entry of any order allowing for sanctions.

12. It is Plaintiffs' position further that since jurisdiction now vests in the Sixth Circuit Court of Appeals this Court does not have authority to act on this Motion for Sanctions.

WHEREFORE, Plaintiffs respectfully request this Honorable Court enter an Order denying the motion for sanctions since the Court is precluded from jurisdiction in this matter based upon the Sixth Circuit Court of Appeals having Notice of Appeal filed on August 4, 1992.

Respectfully submitted,

/s/ Jack C. Chilingirian
JACK C. CHILINGIRIAN (P 11838)
Attorney for Plaintiff/Appellants
24055 Jefferson, Suite 200
St. Clair Shores, MI 48080
(313) 777-0400

Dated: August 20, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 87-CV-70451-DT
HONORABLE PAUL V. GADOLA

EDGAR J. DIETRICH and THERESITA DIETRICH,
Plaintiffs,

VS.

SUN EXPLORATION AND PRODUCTION COMPANY, a Delaware Corporation, and SUN OPERATING LIMITED PARTNERSHIP, a Delaware Limited Partnership,
Defendants.

JACK C. CHILINGIRIAN (P 11838)
Attorney for Plaintiffs
24055 Jefferson Ave., Ste. 200
St. Clair Shores, MI 48080
(313) 777-0400

LYNAM & ASSOCIATES
BY: TERENCE V. LYNAM (P 26490)
SUSAN LESNEK (P 38447)
Attorneys for Defendants
P.O. Box 80705
Lansing, MI 48908
(517) 321-4545

BRIEF IN SUPPORT OF ANSWER TO MOTION FOR FRCP 11 SANCTIONS

NOW COMES the above named Plaintiffs, EDGAR J. DIETRICH and THERESITA DIETRICH, by and through their

attorney, JACK C. CHILINGIRIAN, and submits this Brief in support of their Answer to the Defendants' Motion for Sanctions:

FACTS

The presentation of the facts in Defendants' briefs are a miscatag orization of what transpired from the very outset of these proceedings. Initially this case was filed in Wayne County Circuit Court and removed by the Defendants to the United States Federal District Court and the case was assigned to the Honorable Patrick Duggan.

In preliminary filings Judge Duggan denied Defendants' Motion for Summary Judgment except as to Count II. Subsequently, this Court granted summary judgment as to Counts I, III and IV. It was denied as to Count V.

During the course of the proceedings, the issue as it relates to Count V became crystal clear and in the presentation of the Final Pre-Trial Order Plaintiffs reserved the right to file a motion to amend their complaint which they did on the eve of trial.

While it is certainly within the discretion of this Court to make a determination with respect to factual assertions, it is certainly within this Court's discretion to grant a motion to amend, even after proofs are presented. A good faith effort to clear up any technical defect with respect to a pleading should not then be met with such a stinging Motion for Sanctions submitted by these Defendants.

The Plaintiffs respectfully suggest to this Court that many of the factual recitations in its recent opinion are not entirely accurate. Many of the requests for adjournment were made by agreement and stipulation of the parties. Further, this Court on numerous occasions adjourned the trial date on its own order. Suffice it to say from the time period in 1989 when this Court inherited the file until

1992 when trial commenced many of the adjournments were at the Court's insistence and not by the parties. Rather than argue over the time constraint Plaintiff would prefer to comment about the alleged insufficient and spurious claims as recited by the Defendants.

LEGAL AUTHORITY

The standard for testing conduct under Rule 11 is one of reasonableness under the circumstances. The District Court needs to inquire what was reasonable to believe at the time the pleading, motion or paper was submitted. (*Eavenson, Auchmuty and Greenwald* v *Holtzman*, 775 F2d 535 (3rd Cir. 1985).

Initially, Plaintiffs would indicate that it has been held that Rule 11 Sanctions cannot be imposed on Plaintiffs whose complaint was originally filed in State Court and later removed to Federal Court by Defendant's Petition since at the time the pleading was signed, Rule 11 did not apply and it could not be give retrospective application. (*Stiefvater Real Estate Inc.* v. *Hinsdale*, 812 F2d 805 (2nd Cir. 1987). Moreover, in the committee comments to Rule 11 it has been suggested that:

> "The revision leaves for resolution on a case by case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be filed. Ordinarily, the motion should be made promptly after the inappropriate paper is filed! and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the 'safe harbor' provisions . . . a party cannot delay filing its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention)."

Further, under the Committee Comments relative to Rule is suggested that:

> "These provisions are intended to provide a type of 'safe harbor' against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation."

In the instant case, Plaintiffs' counsel, at the time of the submission of the Final Pre-Trial Order, clearly preserved the right to file a motion to amend which he did so on the eve of trial. The only technical defect relating to the pleadings is a specified time period within which Plaintiffs believed that this production of oil had taken place and they attempted to correct that pleading deficiency prior to trial. When the Court indicated that it was not amenable to or would not allow such an amendment, Plaintiffs' counsel, with some degree of intellectual honesty and candor admitted that it did not have evidence to support that specific allegation recited in Count V. He did indicate that the proofs would be able to establish a time period *prior* to that reccited in Count V. Thus, it can be noted that for his candor portrayed before the Court on July 2, 1992, the Defendants are now seeking sanctions under Rule 11.

It should be clear that Plaintiffs previous reliance upon the predecessor Court's ruling on a Motion for Summary Judgment as the bsis [sic] for believing they had a viable cause of action, it should not now form the basis for a Rule 11 sanction based on a subsequent granting of a summary judgment motion pertaining to three of the four remaining Counts. All of the Counts that were dismissed formed the basis of the allegations and provided the underlying factual presentation for a submission of the record on Count V.

In the instant case, it is clear, from this Court's ruling on February 6, 1992, that the records of Sun Oil clearly suggested production of oil that had not been paid for. The only defect in the pleadings was a time frame within which this was allegedly to have occurred.

Under Rule 11, there is no longer an inquiry into the subjective good faith intent of a party. Moreover, under Rule 11 a Court must examine the objective reasonableness of the claims in light of existing law and facts. (*Michigan National Bank* v *Kroger Company*, 619 FSupp 1149 (E.D. Mich. 1985). In the instant case it is certainly arguable on an objective basis that Plaintiffs and their counsel, based on the Court's ruling relative to Count V, could reasonably conclude that a motion for an amendment to clarify defect in the pleadings would be granted. As the record should reflect and the pleadings and brief in support of the motion to amend will clearly denote this Court had the authority to make such a ruling. However, the denial of such an amendment should not now lead to the imposition of sanctions as requested by the Defendants in their motion.

Based upon the presentation as to the costs expended with no specific affidavit or presentation of facts, or documents to support such costs this Court cannot entertain the imposition of sanctions for costs and attorney fees without specifically being presented with a breakdown of those costs and attorney fees.

Further, as a result of the submission of the Notice of Appeal and the docketing of the Claim of Appeal in the Sixth Circuit it is the Plaintiffs' position that jurisdiction to hear this Motion has been lost by the Court.

Based upon the above authority, it is the position of the Plaintiffs that this motion for sanctions should be denied.

Respectfully submitted,

/s/ Jack C. Chilingirian
JACK C. CHILINGIRIAN (P 11838)
Attorney for Plaintiffs
24055 Jefferson, Suite 200
St. Clair Shores, MI 48080
(313) 777-0400

Dated: August 21, 1992